

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ
 حَمْدُ اللَّهِ اسْتِغْفَارُهُ وَاسْتِغْفَارُ النَّاسِ مِنْ عَصْيَانِهِ وَتَوْفِيقُهُ وَصَلَّى اللَّهُ
 عَلَى مُحَمَّدٍ النَّبِيِّ وَآلِهِ وَسَلَّمَ كَثِيرًا
 قَالَ اللَّهُ خَلَقَ سَاوَهُ وَفَعَلَ سِوَاهُ فِي سَائِرِ أَسْمَاءِهِ وَوَحَّاهُ إِلَى رَسُولِهِ صَلَّى اللَّهُ عَلَيْهِ
 وَلَعَنَ كُفْرَهُ فِي الْوُجُودِ مِنْ مَعْدِنِ الْأَكْثَرِ الْأَرْضِ بِمَا عَنَادَ الصَّالِحِينَ
 إِنَّ فِي هَذَا السَّلَاحِ الْمَوْجُودِ عِنْدَ مَنْ وَمَا أَرْسَلْنَا إِلَّا رَحْمَةً لِّلْعَالَمِينَ وَقَالَ
 حَزْمَانُ وَمَا أَرْسَلْنَا إِلَّا كَافَّةً لِّلنَّاسِ سَيِّئًا وَنَذَرْنَا لِشَرِّ الْأَكْثَرِ الْأَعْرَافَ
 لَا تَعْلَمُونَ وَأَعْلَمَ حَزْمَانُ أَنَّهُ وَرَسُولُهُ أَلْفَعَدَا أَرْسَلَهُ إِلَى النَّاسِ أَنَّهُ
 لَسَوْفَ يَنْصَرُّوهُ وَإِنِّي أَخْلَقْتُ لَهُ بِأَعْلَانَةٍ ذَلِكَ مَا أَخَصَّ بِهِ مِنْ فَضْلِهِ
 عَلَى مَنْ سَلَفَ مِنْ أَسْمَاءِهِ وَرَسُولُهُ أَدَّكَانَ سَيِّئًا وَنَذَرْنَا لِشَرِّ الْأَكْثَرِ الْأَعْرَافَ
 السَّالِفِينَ إِنَّمَا كَانُوا يَعْنُونَ خَلْقًا خَاصًّا مِنَ النَّاسِ وَحَلَّ مِنَ الْخَلْقِ وَحَصْرُ
 أَنَّهُ صَلَّى اللَّهُ عَلَيْهِ وَآلِهِ بِالْوَسَالَةِ الْعَامَةِ وَالْأَعْوَةِ الْكَافَةِ
 إِلَى آيَاتٍ مِنَ اللَّهِ مَبْرُورَةٍ وَأَوْحَى لَهُ فَضْلُهُ وَحَمَرَهُ الرِّسَالَةَ وَحَلَّ أَمْرَهُ خَيْرَ
 الْأُمَمِ الْحَالِ مَعَالِ كَيْفِ خَيْرَانِهِ أَحْرَجَ لِلنَّاسِ بِأَمْرٍ بِالْعُرْوَةِ وَبِهِمْ
 عَلَى الْبُكْرَةِ وَتَوْفِيقًا لِلَّهِ وَصَلَّى اللَّهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ عَلَى الْمَلِكِ
 مَعَالِ هُوَ الَّذِي أَرْسَلَ رَسُولَهُ الْقُدُّوسَ وَدُونَهُ لِيُظْهِرَهُ عَلَى الدِّينِ كُلِّهِ
 وَلَوْ كَرِهَ الْمُشْرِكُونَ ثُمَّ لَمْ يَخْبِرْهُ إِلَّا خَيْرَ أَسْمَاءِهِ السَّيِّئَةِ وَأَوْصَحَ لَهُمْ
 الطَّرِيقَ وَمَعَرَفَهُمُ السَّمَّ الْمُسَوِّمَ وَالْأَحْكَامَ الْمَوْضُوعَةَ فِي أَهْلِ الْبَيْتِ

AL-TABARĪ'S *BOOK OF JIHĀD*

A TRANSLATION FROM THE ORIGINAL ARABIC

WITH AN INTRODUCTION, COMMENTARY, AND NOTES
BY YASIR S. IBRAHIM

12-1A



AL-TABARĪ'S *BOOK OF JIHĀD*

AL-ṬABARĪ'S *BOOK OF JIHĀD*
A Translation from the Original Arabic

With an Introduction, Commentary, and Notes by
Yasir S. Ibrahim

With a Foreword by
Yitzhak Nakash

The Edwin Mellen Press
Lewiston•Queenston•Lampeter

Library of Congress Cataloging-in-Publication Data

Al-Tabari.

Al-Tabari's Book of Jihad : a translation from the original Arabic / with an introduction, commentary, and notes by Yasir S. Ibrahim ; with a foreword by Yitzhak Nakash.

p. cm.

Includes bibliographical references and index.

ISBN-13: 978-0-7734-5458-3

ISBN-10: 0-7734-5458-6

I. Title.

hors série.

A CIP catalog record for this book is available from the British Library.

Front cover illustration: The first page of text in the Mustafa Effendi MS, Istanbul

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The Edwin Mellen Press
Box 450
Lewiston, New York
USA 14092-0450

The Edwin Mellen Press
Box 67
Queenston, Ontario
CANADA L0S 1L0

The Edwin Mellen Press, Ltd.
Lampeter, Ceredigion, Wales
UNITED KINGDOM SA48 8LT

Printed in the United States of America

To Nagham, Noor, Arwa, Sumia and Amar

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PREFACE

The notion of *jihād* during the Classical Islamic Period (ca. 750-1258 C.E.) requires careful analysis, as it provides a model for the Islamic state in which relations with non-Muslims are determined according to the Classical juristic rulings. At a time when Islamic resurgence in the Middle East and other parts of the world has produced several instances of political opposition movements – some powerful enough to seize outright control of the government – and which describe their agendas in terms of implementing Islamic teachings in every aspect of social life (including the treatment of non-Muslims in Muslim societies and political positions toward non-Islamic states), the model of *jihād* provided by Muslim jurists in their works during the eighth and ninth centuries C.E. and onwards represents an important source for these modern activists. Scholars of Islam have also followed the development of the *jihād* doctrine so as to understand the contemporary Islamic perspective of international relations, human rights, and political/social justice.

This book is a translation of the *Kitāb al-Jihād* (*The Book of Jihād*), part of *The Book of the Disagreement Among Muslim Jurists* (*Kitāb Ikhtilāf al-Fuqahā'*) by the Classical Islamic scholar Muḥammad ibn Jarīr al-Ṭabarī (837-923 C.E.). This book is an important early source for comparing the principal views of *jihād* and related subjects as promulgated by the founders of the three Sunnī schools of jurisprudence: Abū Ḥanīfa (d. 767 C.E.) and his disciples, al-Shāfi'ī (d. 820 C.E.), and Mālik b. Anas (d. 795 C.E.). Furthermore, *The Book of Jihād* expounds (in some cases, preserves) the opinions of several other well-known Muslim jurists considered to be the forerunners of classical *fiqh* – the “science” of religious law or jurisprudence in Islam – including al-Awzā'ī (d. 774 C.E.), Sufyān al-Thawrī (d. 778 C.E.), and others.

The English translation provided in this book is based on a microfilm copy of the only extant manuscript of al-Ṭabarī's *Book of Jihād* located at the Sulaymāniyya Library in Istanbul, Turkey. The manuscript is listed within the "Library of Mustafa Effendi," number 382. The numbers of the manuscript's folios are printed in the translation within brackets before the first word of each folio. More information about this manuscript is provided in the Translator's Introduction.

Although I tried to limit the number of Arabic terms cited in the translation, I had to keep some of these terms mostly to illustrate the jurist's choice of technical terms used in Islamic law such as *qiyās* (analogy) and *ijmā'* (consensus). As for the transliteration of Arabic terms, I use the symbols ā, ū, and ī to transliterate Arabic long vowels *alif*, *wāw*, and *yā'* respectively. As for consonant letters, I use the symbols ṭ, ṣ, ṣ, ḍ, and ḥ to transliterate the Arabic letters ط, ظ, ص, ض and ح respectively. Also, in writing Arabic words, I do not include the final respirational sound, *hā'* (h), that should be pronounced at the end of many words such as *sīra(h)* and Abū Ḥanīfa(h). In general, I follow the transliteration system adopted by the *International Journal of Middle East Studies*.

I would like to extend my thanks to the librarians of the Sulaymāniyya Library in Istanbul for providing me with the manuscript's microfilm and to John Kelsay for introducing me to this manuscript and for his valuable comments on the translation. Also, I am grateful to David Levinson and Shannon Burks for reading and commenting on an earlier version of part of the translation. Finally, I am truly indebted to Denise Soufi for her scholarly comments and for her excellent work on editing and formatting the text.

FOREWORD

In the wake of the 9/11 attacks in the United States by a group of Sunni militants seeking to hit the leading Western power in its territory, there has been much discussion in the media regarding the concept of *jihād*—an armed struggle waged by Muslims against those at home and abroad who are deemed to be enemies of Islam. Most writers have paid little attention, however, to the evolution of the concept of *jihād* in Islamic classical times and the extent to which the classical model has influenced the actions of contemporary Islamists as well as relations between Muslim and non-Muslim states.

Yasir Ibrahim's lucid translation of the book of *jihād* by al-Tabarī (the famous Muslim historian and Qur'ānic commentator of the first three or four centuries of Islam), accompanied by an illuminating introduction, greatly advances our understanding of *jihād*. Tabarī's book provides a rare resource for examining the opinion of classical jurists on the various categories of *jihād*, the circumstances under which Muslim rulers could wage war against non-believers, and the conditions for signing truce and peace agreements between Muslim and non-Muslim states.

Ibrahim's discussion tackles questions of immediate relevance to the current debate on the state of Islam: What is the purpose of *jihād* and how relevant is the classical concept to our times? Can Muslim states have permanent peace agreements with non-Muslim states, or should agreements be subject to time limits? In exploring these questions, Ibrahim sheds light on debates among Islamists regarding the interpretation of classical religious texts on *jihād*, and he

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shows the difficulty they face in adapting the classical model to the complex relations between Muslims and non-Muslims today.

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TRANSLATOR'S INTRODUCTION

The Meaning and Types of *Jihād*

The term *jihād* in Arabic means struggle or exerting the utmost effort (*juhd*) to achieve a goal. This term was incorporated into Islamic parlance because Islam's holy book, the Qur'ān, mentions the noun *jihād* and its verbal variations, such as the past singular tense *jāhada* and the present plural *yujāhidūna*.¹ In the second source of religious knowledge in Islam, the *ḥadīth*, or the traditions representing the sayings and actions of Muḥammad, the Prophet of Islam (570-632 C.E.), there is a collection of traditions that mention *jihād* as one of the important religious duties.² But what exactly is this struggle aiming to achieve? A student of Islamic studies today will note that the current interest in the subject of *jihād* comes as a reaction to the media coverage of political events and armed conflicts in which groups of activists claim to describe their militant struggle as *jihād*. They seek by this usage a religious sanction that claims to be speaking in the name of God (Allah). One must, therefore, first define the meaning and different senses of the word *jihād* in Islam in order to understand the historical context in which al-Ṭabarī wrote his *Book of Jihād*.

Some Western scholars of Islam, such as the historian Bernard Lewis, think that the literary tradition of Islam for most of its history expressed the notion of *jihād* as a military struggle against disbelievers. According to this scholarly view, the classical tradition of religious thought throughout the Middle Ages and

the pre-modern period clearly depicts *jihād* as an armed struggle against disbelievers for the sake of God.³ This line of thought further elaborates that it is only in the modern conceptualization of *jihād* that it becomes transformed into a spiritual struggle more than anything else. Also, this line of thought attributes such a peaceful and spiritual representation of *jihād* to the secular humanist tradition of the West rather than an indigenous tradition embedded in Islamic history.

One should not, of course, distort the reality of a religious tradition by reinterpreting it in the light of modern ideas and claim that such modernist interpretation was the norm across different historical periods. But one must also be careful not to dismiss the classical history of a religious tradition as anti-modern by virtue of its historicity alone. It is true that in the works of *fiqh*, Islamic jurisprudence relating to the *sharī'a* or Islamic law, *jihād* appears as a distinct section within these works and refers to a war waged for the sake of God. This is because works of Islamic jurisprudence were written to provide answers to legal questions concerning individual or communal conduct in Muslim societies at the time. Some of them begin by mentioning the role of intention in religious practice and also include sections on moral behavior, but they are not treatises on spirituality in Islam. Since medieval Muslim writers mostly followed a Qur'ānic conception of *jihād* as referring to any struggle for the sake of God, in works that deal with spirituality and achieving righteousness based on Islamic values, *jihād* is presented as referring to spiritual and personal struggle.⁴

What is mainly developed in Islamic thought based on the Qur'ānic conception of *jihād* is that since Islam means submission to the will of God, it

requires its followers to be in a special state of spiritual and social preparation, and when practicing their religion and living their lives as Muslims, there should be a psychological and communal state in which the individual and the community are expected to exert the most effort they can to purify their beliefs and relationship with God and to conduct their affairs. This is the active personal and communal state of *jihād*. This comprehensive understanding of *jihād* can be illustrated in the writings of the fourteenth-century Sunnī Muslim jurist Ibn Qayyim al-Jawziyya (d.1350).

He explains in his *Zād al-Ma'ād fī Hady Khayr al-'Ibād* (*Provisions for the Hereafter [Taken] from the Guidance of the Best of [God's] Servants*) that there are four types of *jihād*.⁵ The first one is called *jihād al-nafs*, the struggle to purify the self by gaining knowledge in religion and then acting accordingly. It also includes the effort to teach the principles of Islam to people and to have patience when being harmed by those who reject the faith. This type of *jihād* corresponds to the Qur'ānic verse, "And those who strive [*jāhadū*] in our cause-- We will certainly guide them to our paths" (Q. 29:69). Ibn Qayyim mentions earlier in his book that the *jihād* against the enemies of God is but a branch of this first type, in the sense that no one can struggle against an enemy without first being in a state of struggle against one's own ignorance and lack of religious knowledge.⁶ To support his argument, he refers to the Prophetic tradition which states, "The *mujāhid* is the one who struggles against one's own [desires]."⁷ The second type of *jihād*, according to Ibn Qayyim, is the *jihād* against the source of evil inclinations, Satan. This includes one's struggle to get rid of any doubts that plague his or her faith and also to get rid of evil desires. The third type of *jihād* is

the *jihād* against disbelievers. It could include struggles by the heart, tongue, property, or hand. The latter refers to using force against the enemies of the Muslim community. As an example of a struggle by the tongue against disbelievers, Ibn Qayyim refers to the Qur'ānic verse, "Listen not to the unbelievers, but strive against them with the utmost strenuousness, with the (Qur'ān)" (Q. 25:52), and comments that "this [verse] is in a Meccan chapter in which the Prophet was ordered [by God] to make *jihād* against disbelievers through the use of argumentation and exposition."⁸ The fourth type is the *jihād* against hypocrites. This is based on the Qur'ānic verse calling on the Prophet to "strive hard (*jāhid*) against the unbelievers and the hypocrites" (Q. 9:73). It refers, according to Ibn Qayyim, to a peaceful struggle to foil the plans of an internal enemy of the Muslim community. Historically, tradition informs us that Muḥammad did not put to death those who were clearly perceived as hypocrites among the people of Medina although they were believed to be conspiring with the Meccan polytheists against Muslims.⁹

This representation of the four types of *jihād* and its comprehensive meaning of religious struggle towards a specific goal in Ibn Qayyim's *Zād al-Ma'ād* reflects the nature and style of a book that is not considered a typical legal work. Although Ibn Qayyim includes many topics that fall within *fiqh* books, his work, nevertheless, strives to show that the best religious provisions for a Muslim to prepare for the Day of Judgment can be gained by following the Prophetic practice (*sunna*). Thus, he does not engage in detailed exposition of the different opinions among legal schools on the discussed topics; rather, his aim is to record Prophetic practice, according to his judgment, and methodologically he employs a

style of literary writing that is common among treatises on Islamic spirituality and moral guidance.

After explaining the comprehensive meaning of *jihad* in the light of Qur'ānic verses and Prophetic traditions, Ibn Qayyim proceeds with presenting the topic of *jihād* taking into consideration its specific legal usage as a "war waged for the sake of God." Since most classical treatises on "*jihād* and *siyar*" begin with focusing on the Prophetic practice in dealing with contemporary disbelievers, Ibn Qayyim follows the different stages of Muḥammad's life in Mecca and Medina to show how the Prophet actually practiced all of the subtypes of the third type of *jihād* against the Meccan polytheists. He presents the traditional view in which the relationship between the nascent Muslim community during the time of Muḥammad and the polytheists of Mecca developed in four stages. Here, Ibn Qayyim's Qur'ānic references do include not only verses in which the term *jihād* or one of its derivatives is used, but also verses in which the Arabic term *qitāl* (fighting or combat) or one of its verbal variations appear and verses in which there is a reference to the relationship between Muslims and polytheists without necessarily having one of the two terms *jihād* or *qitāl*. In his listing of the four stages, Ibn Qayyim follows the events in the life of Muḥammad as recorded in the books of *sīra*, especially that of Ibn Ishāq.

The first stage covers the life of Muḥammad and his companions in Mecca, in which using force against the Meccan polytheists was forbidden. Ibn Qayyim acknowledges that there were two main periods within the first stage. The first period can be called "non-confrontational pacifism." It started in the early days after Muḥammad began receiving Qur'ānic revelation according to

tradition (ca. 610 C.E.) and specifically when verses 1-7 in chapter 74 were revealed. These called upon Muḥammad to warn the polytheists of Mecca to believe in God. But according to tradition, Muḥammad spread his message through Meccan society in the first three or four years of his career as a prophet through non-confrontational invitation to Islam. He did not engage in any kind of verbal attack against the existence of the approximately three hundred and sixty idols inside the Ka'ba, the center of the holy mosque in Mecca. But it is believed that when the Qur'ānic verse 15:94 was revealed to Muḥammad, "Expound openly what thou art commanded, and turn away from those who join false gods with Allah," he called upon his fellow Meccans to disparage idol worship and commit themselves only to worshipping Allah as the One and Only God. Due to this verbal confrontation with the Meccan polytheists, Muḥammad and his companions suffered persecution for the rest of their stay in Mecca until their emigration to Medina (*hijra*) in 622 C.E. The Qur'ānic verse 4:77, "Hast thou not turned thy vision to those who were told to hold back their hands (from fight) but establish regular prayer and spend in regular charity," indicates that Muslims were instructed in Mecca not to fight back by using any kind of physical force against the polytheists. Therefore, this second period can be called "confrontational pacifism." There are also other Qur'ānic verses that instruct Muslims to peacefully ignore and forgive those who aggress against them.

The second stage, according to Ibn Qayyim, represents the first few years in the life of Muḥammad and his companions in the city of Medina after their emigration (*hijra*) from Mecca. Muslims were given permission, based on Q. 22:39, to fight back against the Meccan polytheists. In the third stage, Muslims

were obliged to fight back against those who fought them and avoid any act of aggression. This is clear in the Qur'ānic verse 2:190, which reads, "Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors." In the fourth stage, Muslims were instructed to present the Arab polytheists with an option of either converting to Islam or facing war (e.g. Q. 9:5). But Muslims also were instructed to fulfill their promises and abide by the terms of any peace treaty that they conducted with the polytheists (e.g. Q. 9:12).¹⁰

One can conclude, therefore, that Ibn Qayyim's *Zād al-Ma'ād* is an example of a work by a medieval jurist who presents a comprehensive view of *jihād* in which the reference to war lies only within one of four types. One has to acknowledge, therefore, the existence of such kind of usage in addition to the main reference to *jihād* in purely legal works as a war waged for the sake of God against disbelievers. The latter is the meaning that is used by al-Ṭabarī in his *Book of Jihād*. But as this work illustrates, since the writings on warfare in Islam were developed by al-Awzā'ī (d. 774) and Muḥammad al-Shaybānī (d. 804), who wrote separate treatises under the title of *siyar* (conduct of state),¹¹ the sections on *jihād*, sometimes called "the Book of *Jihād* and *Siyar*," deal with questions that not only relate to waging war against disbelievers and the justification for waging war but also the conduct of war and the restrictions on Muslim combatants from killing or injuring certain categories of people. In addition, the topic of *jihād* in legal works also contemplates the prospect of peace between the Islamic state and non-Muslim states. Furthermore, it deals with questions that relate to the distribution of booties and the status of slaves during the time of war and other related topics.

Such topics express to some extent the social, political, and military environment of the time in which those Muslim jurists lived. In al-Ṭabarī's *Book of Jihād*, the questions presented to the jurists and their replies to them reflect the environment of the eighth and early ninth centuries, especially with regard to the military activities of the Umayyad and 'Abbāsīd states against the Byzantines.

Modern scholars of Islam in general are interested in specific topics among the classical writings on *jihād*. The first one relates to the question of justification, namely, what justifies waging war against enemies in Islam? This is represented comparatively in the Western just war tradition as *jus ad bellum*. The second topic is related to what is called *jus in bello*, i.e. the conduct of the combatants during warfare and whether from a comparative perspective notions of proportionality, non-combatant immunity, and others are presented in the Islamic tradition.¹² Therefore, one might find topics such as the status of slaves during war or disagreements among jurists on how the spoils of war should be distributed to be irrelevant when taking the modern situation into account. But the significance of such topics is that first, they provide extra material by which a contemporary reader can understand the reasoning of medieval Muslim jurists that also helps to address the questions of justification and the conduct of combatants during war. Second, they shed some light on the environment in which those jurists contemplated the questions addressed to them by their interlocutors. These points can, in fact, help the contemporary reader see how this classical view of *jihād*, and war and peace in general, was influenced and shaped by a reality of existing religious communities and political entities that were very different from our own modern experience. And of course, for a committed Muslim, there is the

question as to what should be regarded as the Islamic view that must be applied today and what is purely contextual and conditioned by the historical reality of the life of Muslims in the eighth and ninth centuries.

Al-Ṭabarī and His *Book of Jihād*

Muḥammad ibn Jarīr al-Ṭabarī, the well-known Muslim historian and jurist, was born in the city of Amul in the province of Ṭabaristān (modern Iran) in 837 C.E. (A.H. 224). From an early age he traveled to various places in his quest for erudition, finally settling in Baghdad, capital of the 'Abbāsid Caliphate. He developed his thought mainly within the Shāfi'ī school of jurisprudence. At one time, he was the disciple of al-Rabī' al-Murādī, one of the famous narrators of the opinions of al-Shāfi'ī. Al-Ṭabarī also learned from other jurists representing the Sunnī schools of Abū Ḥanīfa and Mālik. Later in his life, he developed his own school of juristic thought (*madhhab*), but his disciples did not continue to spread the principles of this school and it eventually disappeared. He died in Baghdad in 923 C.E. (A.H. 310).

Al-Ṭabarī's major works are the famous *Tārīkh al-Rusul wa'l-Mulūk* (*History of the Messengers and Kings*) and his Qur'ānic commentary, *Jāmi' al-Bayān 'an Ta'wīl Āy al-Qur'ān* (*The Collection of Exposition on the Interpretation of Qur'ānic Verses*). Also of note is the *Tahdhīb al-Āthār* (*The Clarification of Traditions*). Several of his books have been lost, while others have come down to us only in fragments or through quotations by later Muslim scholars.

Indeed, such is the case with al-Ṭabarī's *Kitāb Ikhtilāf al-Fuqahā'* (*The Book of the Disagreement Among Muslim Jurists*). Several early students of al-

Ṭabarī's life and work, including al-Khaṭīb al-Baghdādī (d. 1071) in his *Tārīkh Baghdād* (*History of Baghdad*) and Ibn Khallikān (d. 1282) in his chronological work *Wafayāt al-A'yān* (*On the Death-Dates of Illustrious Persons*), describe al-Ṭabarī's *Ikhtilāf al-Fuqahā'* as covering various topics of Islamic jurisprudence (*fiqh*) for each of which the author recorded the opinions – both concurring and dissenting – handed down through time from Muslim jurists (consistent with the *ikhtilāf* genre of Islamic scholarly discourse; see below).¹³ For further insight, we must be content with surviving manuscript fragments.

One of these fragments, discovered in the al-Khidaywiyya Library in Cairo, was edited and published by Frederick Kern in 1902.¹⁴ It contains some parts of al-Ṭabarī's *Ikhtilāf*, such as the *Kitāb al-Mudabbbar*¹⁵ and the *Kitāb al-Buyū'* (*The Book of Commerce*). In his introduction, Kern mentions another manuscript found in Constantinople (now Istanbul) in the "Library of 'Asher Efendi," containing parts entitled *Kitāb al-Jihād wa'l-Jizya* (*The Book[s] of Jihād and Tribute*). The present translation of *The Book of Jihād*¹⁶ is based on a microfilm copy of this original manuscript located in the Sulaymāniyya library in Turkey.

In 1933, Joseph Schacht published this Constantinopolitan manuscript under the Arabic title *Kitāb al-Jihād wa Kitāb al-Jizya wa Ahkām al-Muḥāribīn min Kitāb Ikhtilāf al-Fuqahā'*;¹⁷ according to Schacht, "the exact dating of this codex is not very easy, but it is possible to date its origin to the fourth-sixth centuries A.H. (tenth-twelfth centuries C.E.)." But Schacht concludes that, based on comparing the writing of the manuscript with the published manuscripts by

Bernhard Moritz in his *Arabic Paleography*, most likely the manuscript of al-Ṭabarī's *Ikhtilāf al-Fuqahā'* was produced in the tenth century C.E.¹⁸

In this critical edition, Schacht aims at finding the true text of al-Ṭabarī by comparing the author's quotations of the jurists with the original texts of their well-known works, such as the *Kitāb al-Umm* (*The Mother [of Jurisprudence]*) by al-Shāfi'ī, *Al-Mudawwana al-Kubra* (*The Great Treatise*) by Saḥnūn b. Sa'īd (d. 854) in which most of Mālik's legal opinions are recorded, and the *Kitāb al-Kharāj* (*The Book of Land Tax*) by Abu Yusuf (d. 798 C.E.), a disciple of Abū Ḥanīfa. While Schacht's edition aims at authenticating the text of the manuscript, it lacks any commentary on the topic of *jihād* and the different questions addressed to the jurists whom al-Ṭabarī cites in his work. Therefore, my work on translating the text into English includes an analysis of the main topics in the book and also provides notes wherever necessary to clarify the text as much as possible.

If al-Ṭabarī developed his own school of juristic thought and had his own disciples, then why are his independent legal views not expressed in his *Book of Jihād*? This is first due to the genre of *ikhtilāf* in which al-Ṭabarī's aim is to document the views of earlier jurists on matters related to *jihād*. The second factor might be explained by the biographers of al-Ṭabarī's life and works in which there is a suggestion that most likely the book of *Ikhtilāf al-Fuqahā'*, of which the *Book of Jihād* is only one part, was one of the earliest books that he wrote, probably before he developed his own independent school of juristic reasoning.

The Structure and Content of *The Book of Jihād*

As mentioned above, al-Ṭabarī's *Book of Jihād* represents the juristic genre of *ikhtilāf* ('disagreement') literature. Several books in this category were written both before and after al-Ṭabarī's time,¹⁹ but most of the extant *ikhtilāf* literature stems from jurists after al-Ṭabarī's time. In books of *ikhtilāf*, the reader finds a comparison of the opinions of Muslim jurists regarding the given topics; hence, the author's/compiler's point of view is revealed only by the choice of these topics and the organization of the jurists' opinions within each section. In *The Book of Jihād*, the material is divided into many divisions or sections, each of which begins with al-Ṭabarī's opening sentence defining the topic for that section.²⁰ Within each section, the various questions posed to Muslim jurists on the given topic and their answers (or, judicial opinions, *fatwas*) to these are provided.

The Juristic Chains of Authorities (*isnāds*)

As previously indicated, al-Ṭabarī relates the opinions of the founders of three famous Sunnī schools of jurisprudence: Abū Ḥanīfa and his companions, al-Shāfi'ī, and Mālik b. Anas; he also records the opinions of al-Awzā'ī (d. 773), Sufyān al-Thawrī (d. ca. 778), al-Ḥasan al-Baṣrī (d. 728), and others. In accordance with the rules of *ḥadīth* ('tradition'), al-Ṭabarī refers to the 'chain of authorities' who serve as the narrators by whom he relates the opinions of the jurists before his time.²¹ These chains of authorities are the following:

Al-Ṭabarī---Yūnus (b. 'Abd al-A'lā)---Ashhab (b. 'Abd al-'Azīz)---Mālik
(b. Anas)

Al-Ṭabarī---Yūnus (b. 'Abd al-A'lā)---Ibn Wahb---Mālik (b. Anas)

Al-Ṭabarī---al-'Abbās (b. al-Walīd)---his father (al-Walīd b. Mīzyad)---al-Awzā'ī

Al-Ṭabarī---Mu'āwiya (b. 'Amr)---Abū Ishāq (al-Fazārī)---al-Awzā'ī

Al-Ṭabarī---al-'Abbās (b. al-Walīd)---his father (al-Walīd b. Mīzyad)---

al-Awzā'ī---Khaṣīf (b. 'Abd al-Raḥmān)

Al-Ṭabarī---Mu'āwiya (b. 'Amr)---Abū Ishāq (al-Fazārī)---Ibn 'Awn

Al-Ṭabarī---Mu'āwiya (b. 'Amr)---Abū Ishāq (al-Fazārī)---(Sufyān) al-Thawrī

Al-Ṭabarī---'Alī (b. Sahl)---Zayd (b. Abū'l-Zarqā')---(Sufyān) al-Thawrī

Al-Ṭabarī---Abū Kurayb---Wakī' (b. al-Jarrāḥ)---(Sufyān) al-Thawrī

Al-Ṭabarī---al-Rabī' (al-Murādī)---al-Shāfi'ī

Al-Ṭabarī---(al-Ḥasan) al-Lu'lu'ī---Abū Ḥanīfa and his companions (Abū Yūsuf,

Muḥammad (al-Shaybānī), and Zufar (b. al-Hudhayl)

Al-Ṭabarī---Bishr (b. al-Walīd)---Abū Yūsuf--- Abū Ḥanīfa and his companions

Al-Ṭabarī---Abū Thawr

Al-Ṭabarī---(Abū Sulaymān) al-Juzjānī---Muḥammad (al-Shaybānī)---Abū Ḥanīfa

and his companions

Al-Ṭabarī---Abū Kurayb---Wakī' (b. al-Jarrāḥ)---Abū Ja'far al-Rāzī---al-Rabī' b.

Anas---Abū'l-'Āliya al-Riyāhī

Al-Ṭabarī---Abū Kurayb---Wakī' (b. al-Jarrāḥ)---al-Rabī' b. Ṣabīḥ---al-Ḥasan

al-Baṣrī

Al-Ṭabarī---Abū Kurayb---Wakī' (b. al-Jarrāḥ)---(Sufyān) al-Thawrī---Hishām

(b. 'Urwa)---al-Ḥasan al-Baṣrī

Al-Ṭabarī---Abū Kurayb---Wakī' (b. al-Jarrāḥ)---(Sufyān) al-Thawrī---Ash'ath

(al-Huddānī)---al-Ḥasan al-Baṣrī

Al-Ṭabarī---Abū Kurayb---Wakī' (b. al-Jarrāḥ)---(Sufyān) al-Thawrī---Ash'ath

(al- Huddānī)---‘Aṭā’ (b. Abū Rabāḥ)

Al-Ṭabarī---Abū Kurayb---Wakī’ (b. al-Jarrāḥ)---Zakariyya b. Abū Zā’ida---

(‘Āmir) al-Sha‘bī

Al-Ṭabarī---Mu‘āwiya (b. ‘Amr)---Abū Ishāq al-Fazārī---(Sufyān) al-Thawrī---

Salama b. Tammām---(‘Āmir) al-Sha‘bī

Al-Ṭabarī---al-Ḥasan b. Yaḥyā---‘Abd al-Razzāq (b. Hammām)---Ibn Jurayj---

Sulaymān b. Mūsā

Al-Ṭabarī---Abū Kurayb---Wakī’ (b. al-Jarrāḥ)---al-Ḥasan b. Šāliḥ---al-Layth

(b. Abū Sulaym)---al-Ḥakam (b. ‘Uṭayba)---Abū Bakr al- Šiddīq

Al-Ṭabarī---Abū Kurayb---Ibn Fuḍayl---al-Walīd b. Jamī’---Abū al-Ṭufayl---Abū

Bakr al- Šiddīq

Al-Ṭabarī---Abū Kurayb---Wakī’ (b. al-Jarrāḥ)---‘Ikrima b. ‘Ammār---Iyās b.

Salama---his father (Salama b. al-Akwa’)---the Prophet

Based on the previous chains of authorities, we readily notice that al-Ṭabarī does not provide a complete chain of narration in his quotations of Abū Ḥanīfa and his disciples, Zufar, Abū Yūsuf, al-Shaybānī and al-Lu’lu’ī, which would suggest a dependence on written works, such as Abū Yūsuf’s *Kitāb al-Kharāj*, in which Abū Ḥanīfa’s opinions are mentioned in detail. Also, al-Ṭabarī depends on al-Lu’lu’ī’s account on the opinions of Abū Ḥanīfa and his other companions; a possible source of such an account might be al-Shāfi‘ī’s *al-Umm*. Another disconnected chain is the one that leads back to the jurist Abū Thawr. In the case of al-Ṭabarī’s quotations of al-Shāfi‘ī, which are almost exactly as written in the latter’s *al-Umm*, one finds that, unlike the Ḥanafī opinions, al-

Ṭabarī took al-Shāfi‘ī’s opinions directly from his disciple al-Rabī‘. Only one of al-Ṭabarī’s chains continues back to the Prophet. Therefore, all of the other Prophetic traditions are mentioned within the jurists’ opinions that are quoted by al-Ṭabarī, mostly without complete chains of authorities. Also, very few of al-Ṭabarī’s chains continue back to the early caliphs Abū Bakr al- Ṣiddīq and ‘Umar b. al-Khaṭṭāb.

The previous group of chains also indicates that al-Ṭabarī did not include in his book the opinions of Aḥmad b. Ḥanbal, founder of the fourth Sunnī school of jurisprudence (and who, like al-Ṭabarī, lived in Baghdad). It is understandable that al-Ṭabarī, being a Classical Sunnī jurist, did not mention the opinions of Shī‘ī jurists on matters of *jihād*, but Aḥmad b. Ḥanbal represents a major figure within the Sunnī tradition. Several biographers of al-Ṭabarī gave different reasons for the absence of Ḥanbalī opinions in al-Ṭabarī’s *Ikhtilāf*, even relating several stories that are of doubtful authenticity.²² But it seems that the main reason is that al-Ṭabarī regarded Ibn Ḥanbal as a traditionist (*muḥaddith*) as opposed to a jurist (*faqīh*); what makes this reason more plausible than others is that other jurists, such as al-Ṭaḥāwī and al-Dabūsī, also failed to include Ibn Ḥanbal’s opinions in their compendia of *ikhtilāf*.²³

Reading through the jurists’ opinions in al-Ṭabarī’s *Book of Jihād*, one sees quite readily that the model of *jihād* as presented is grounded in the differentiation between two geo-political “territories”: the “Territory of Islam” (*dār al-islām*) and the “Territory of War” (*dār al-ḥarb*). This notion of territoriality became very distinctive in the classical period of Islam and was developed by jurists to reflect the historical reality of having two different

political entities, the Islamic state and the non-Islamic states that were called the Territory of War. Throughout the sections of al-Ṭabarī's book, different questions are addressed to the jurists regarding the relations between these two territories, and from looking at the sections about which the jurists had a consensus, one can construct a fairly accurate model of *jihād* during that period of Islamic history. One should not, of course, ignore the opinions of medieval jurists who represented schools of thought that are not mentioned in al-Ṭabarī's book.

Let us look into the specific topics of al-Ṭabarī's *Book of Jihād*. Al-Ṭabarī begins his book with an introduction in which he mentions that one of the main characteristics of Islam is that it is a religious message to humanity and he declares that the way Muslims should treat non-Muslims is already explained in Islamic law. Then, al-Ṭabarī lists his first subheading, the *sīra* (authoritative practice) of fighting polytheists. The only other topical subheading appears before section 21, which is "The opinions concerning the rules for extra shares and booties." These two subheadings assume that all the sections that follow each one of them relate to this general subheading. But the sections in fact diverge into topics that, to some extent, do not directly relate to the general topic of the subheading. For example, in section 37.2, al-Ṭabarī mentions the disagreement among jurists on the rule concerning a Muslim who works as a spy for the enemy. This section does not directly relate to the general topic of the second subheading, the rules concerning extra shares and booties, under which the section is listed.

Also, the term *sīra* that al-Ṭabarī mentions in his first subheading might refer either to *sīrat al-nabī*, the practice of the Prophet, or to the practice of the early community. Al-Ṭabarī, in his first topic after this subheading, section 1,

mentions the unanimous agreement concerning the Prophetic practice, but in many sections afterward, under this first subheading, the Prophetic practice is not clearly mentioned for possibly a simple reason, which is the lack of authoritative narration of such practice. Therefore, one can suggest that al-Ṭabarī's reference to "the *sīra* of fighting polytheists" might refer to authoritative practice in general, including both Prophetic practice as well as the practice of the caliphs, especially the first four "well-guided" caliphs who ruled from 632-661 C.E. Thus, in this sense, *sīra* is used as a singular form of the plural *siyar*, which is the topic that developed in Islamic religious writings to refer to the authoritative way in which Islamic states deal with other states.

Al-Ṭabarī refers to "the scholars of *siyar*" in more than one place in his *Book of Jihād*, such as in sections 5.1 and 34. Under these two subheadings, al-Ṭabarī addresses a variety of topics, most of which appear in earlier and later works of Islamic jurisprudence either within a section on *jihād* or on *siyar*.

Since al-Ṭabarī's book follows the genre of *ikhtilāf* (disagreement among jurists), he begins almost every topic by mentioning first the unanimous agreement among the Sunnī jurists that he includes in his book, and then elaborates on the detailed cases concerning the subject on which they disagree.

There is a relative consistency in terms of the sequence of topics and the grouping of sections on the jurists' disagreements by listing them one after the other after a general topic of unanimous agreement. But there are a few exceptions in which a section related to a specific disagreement appears under two sections of unanimous agreement. For example, this occurs in the case of the jurists' disagreement on the status of monks who are found in enemy territory. It

is first found under section 3.1 in which the question is about a monk's non-combatant status and his immunity from being attacked by combatants in the Muslim army. The same discussion appears under section 38.2, in which the focus is on the status of a monk's properties. This kind of repetition appears to be due to the overlap between the two topics in some of the sections. For the sake of clarity, I provide in the following a list of the main topics addressed by al-Ṭabarī in his *Book of Jihād* and the groups of sections that mostly cover these topics:

- (1) The invitation of polytheists to Islam before fighting with them and the question of justification: Sections 1, 1.1.
- (2) The conduct of Muslim combatants and the enemy's non-combatants' immunity: Sections 2-3.1.
- (3) The rules concerning duels with an enemy combatant: Sections 4, 4.1.
- (4) The rules of peace agreements and pledges of security: Sections: 5-7.1, 10.1-19.1.
- (5) Rules concerning Muslim combatants committing illegal acts in the Territory of War: Sections 19.1-20.1.
- (6) On the rules pertaining to the distribution of booties and the determination of shares in the spoil: Sections 21-38.3.
- (7) Rules pertaining to prisoners of war and the payment of ransom: Sections 39-41.5.

The first general topic appears after al-Ṭabarī's introduction, "The invitation to Islam before fighting the polytheists." There is an assumption in al-Ṭabarī's book based on the jurists' unanimous agreement that non-Muslims must first be invited to Islam before contemplating facing them in battle. Some of the

jurists, however, assume that during their time, i.e. the eighth or early ninth centuries C.E., this invitation to Islam had become unnecessary because they had already heard about Islamic beliefs.

It becomes clear from this topic that according to medieval juristic thought, as presented by al-Ṭabarī, the idea of peace stems from having a cohesive religious community of believers for whom the main reason for engaging in warfare against non-Muslim states is hostility toward their disbelief in Islam. It will be apparent, however, when addressing the topic of peace agreements, that war in the classical understanding does not have to be the only option that defines the relationship between the Islamic state and other states.

It will also become clear that under this general agreement among jurists that non-Muslims, whether individuals or communities, have to be invited to Islam before waging war against them, there is significant disagreement among jurists on the main reason for fighting polytheists. Is it mainly because of their unbelief or because of being in a state of war (*ḥirāba*) against Muslims? This point is addressed in the second general topic: "The rules concerning the conduct of combatants and the categories of people who are immune from being put to death and injured."

This disagreement on the reason for justification appears when addressing the status of enemy non-combatants, especially those who are not mentioned in Prophetic traditions or the practice of the early caliphs after Muḥammad. All jurists agree that women and children are immune from being intentionally put to death or injured. This is based on well-accepted traditions. They also agree that Muslims should fight only those non-Muslims to whom the invitation to Islam has

reached and who, by their refusal to embrace Islam, have become disbelievers (*kuffār* or *mushrikūn*).²⁴ The jurists further agree that enemy combatants may be targeted in a state of war. But the question also relates to non-combatants, whether they are men who do not fight, women, or children. There is also a question that relates to women or boys who are found with the enemy's army shooting at Muslim combatants. If difference in religion is the main reason for fighting polytheists, then should Muslims target all categories of people, including non-combatants? Here, the juristic discourse clearly states that based on authentic traditions, Muslim combatants should not intentionally target women and children.

This conclusion is clear in section 2.2, in which the jurist Mālik b. Anas states that the Prophet forbade putting to death women and children. This represents a challenge to the idea that the main reason for putting to death enemy combatants is their disbelief in Islam, because if this is the case, then why is it that women should not be subjected to this attack? The case of children can be explained from the perspective that children are considered "Muslim" by virtue of their original state of purity from sin. Only when they reach maturity, and in juristic language this refers to attaining puberty and thus being accountable before God, are they considered adults. But women of the enemy represent a category of adults who presumably disbelieve in the Islamic message. There is also another category of people, men who do not fight, such as those with a permanent illness or the crippled, in which there are no clear traditions concerning their status.

Al-Shāfi'ī is among the jurists who believe that the reason for fighting the polytheists is their disbelief in Islam. When faced with the unanimous agreement

that women of the enemy and some men, such as the crippled or the blind, should not be subjected to intentional attack by Muslim combatants, he offers a literal explanation of the traditions that address the question of justification. The most important passage that al-Ṭabarī cites from al-Shāfi'ī is the one in section 3.1 in which al-Shāfi'ī emphasizes the point that the reason for having a rule that prohibits Muslim combatants from putting to death monks who are found in enemy territory is not because they do not fight by virtue of their renunciation but is rather based on a tradition from the first Caliph Abū Bakr. He also argues against other jurists, who focus on fighting Muslims as the reason for attacking the enemy, that if this is the case, then Muslim combatants should not target workers, servants, and all people who do not fight, which is against what most jurists thought to be legitimate.

Other medieval jurists, such as Abū Ḥanīfa and his companions, Sufyān al-Thawrī, al-Awzā'ī, and others, believe that the exclusion of women, children, monks, and other non-combatants from being attacked by Muslim combatants in accordance with several Prophetic traditions and traditions from Muḥammad's companions provides clear indication that the reason for fighting polytheists is their engagement in hostile military actions against the Islamic state. As Sufyān al-Thawrī states in the same section, 3.1, "Whoever has the ability or physical power to fight may be put to death." Thus, the disagreement on putting to death men of certain categories who do not usually fight with the enemy army is based on whether one considers a person a combatant by virtue of his physical ability in the sense that a traveler, for example, might join the enemy army and fight Muslims and therefore should be considered a combatant. This is why al-Awzā'ī

thinks that a traveler or a shepherd found in enemy territory should not be subjected to attack by Muslim combatants: most likely he will not join the enemy's army to fight against Muslims. The case of non-combatants becomes clearer when addressing the question of enemy women who are found fighting with the enemy's army and attacking Muslim combatants. Here, Mālik prefers to literally follow tradition by holding the opinion that Muslim combatants should refrain from attacking women or children who are shooting at Muslims. Whereas al-Awzā'ī, al-Thawrī, and Abū Ḥanīfa and his companions hold the view that enemy women who shoot at Muslims using weapons may be targeted by Muslim combatants. Thus, what shifts the status of women from being spared from attack, despite their disbelief in Islam, into the state of being similar to male combatants is their action of combating the Muslims.

One can also note that when al-Shāfi'ī provides his opinion on the case, he ultimately contradicts his general opinion that the enemy's disbelief is the main reason for shedding his blood. This is because he holds the opinion that if women fight against Muslim combatants, they may be put to death or injured because they become in a state different from the one in which shedding their blood was prohibited. Al-Shāfi'ī does not depend solely on traditions concerning this case, as Mālik does, but rather he declares that the reason for targeting such women is their attack against Muslim combatants, which changes their status from being immune from attack to the one similar to any other enemy combatant. In sum, the minority view of al-Shāfi'ī concerning the question of justification of putting to death enemy combatants does not hold very well compared with other jurists' reasoning.

The remaining point in relation to the reason for instructing Muslim combatants not to attack women or children might be, as some Western scholars suggest, for the benefit gained by enslaving them instead of putting them to death. They can be regarded as part of the spoil of war. But al-Ṭabarī mentions in section 32.2 the disagreement among jurists on the case in which the Muslim army captures a woman and her child but they do not have enough pack animals to take them to the Territory of Islam. Should they take only the mother, the child, or none of them? Most jurists hold the opinion that the child should not be separated from his/her mother and that both should be left behind. No jurist suggests that since the mother is a disbeliever and there will be no benefit for Muslims from leaving her alive, she should be put to death. Thus, the case of sparing women's lives because they are non-combatants is more consistent as an explanation than assuming that benefiting from them through enslavement is the main reason.

There are other categories of people who, according to the jurists, should not be attacked by Muslim combatants, such as Muslim captives and enemy persons who are given a pledge of security by Muslims. But despite the general agreement among jurists that the Muslim army should avoid hitting all those who are immune from being put to death or injured, the majority of jurists approve of targeting a place that has enemy combatants even if this leads to the unintentional death of non-combatants. Even if the enemy uses Muslim captives as a protective shield, the Muslim army can attack the enemy, but here some jurists, such as al-Awzā'ī and al-Shāfi'ī, emphasize the point that the Muslim army should avoid hitting the residential area in an enemy fortress or Muslim captives as much as possible to avoid this unintentional killing. Abū Ḥanīfa and his companions

express the point that in many cases there is no way to fight the enemy without unintentionally hitting some people who are immune from being targeted.

If the majority of the jurists cited by al-Ṭabarī justify the engagement in warfare against disbelievers on the assumption of the latter's state of armed conflict against the Islamic state, then what are the prospects of having peaceful relations with non-Muslims, especially with states that are in conflict with the Islamic state? This is the third topic to which al-Ṭabarī dedicates several sections in his book. The book illustrates that there is a consensus among jurists that although there is very much a possibility of concluding a peace treaty or a truce with the enemy, it must have a time limit. Here, of course, there are two types of agreements that can be concluded between the Islamic state, through its leader, the Imām, and non-Muslims, whether individuals or political entities. The permanent kind of peaceful relationship may be established through a contract of *dhimma* by which a "scripturalist" non-Muslim, i.e. not an Arab polytheist, whether person or state, agrees to pay a yearly poll-tax to the Muslim authorities in exchange for the Muslims' protection for him or for the state, and to have a permanent peaceful relationship with the Islamic state and its majority Muslim citizens. Such states would be, according to this classical model, allied with the Islamic state and individual non-Muslims would be considered protected citizens of the Islamic state (*dhimmīs*). At least theoretically speaking, the jurists agree that this should be the only existing permanent peaceful relationship between the Islamic state and other states.

But there is also a possibility of having a peaceful relationship with other states through concluding peace treaties that are limited in their duration. This is

the case when the non-Muslim state is not expected to pay any kind of tribute to the Islamic state. As al-Awzā'ī explains in section 6.1, this kind of agreement or truce is based on Muḥammad's conclusion of a peace treaty with the Meccan polytheists that was called the peace accord of al-Ḥudaybiya, the name of the place in which it was conducted. The polytheists, according to that agreement, did not promise to pay anything to the Muslims. Jurists and Muslim historians disagree on the duration of that treaty. Although in the well-known biography of the Prophet by Ibn Ishāq the accepted duration was for ten years, al-Ṭabarī refers, in section 5.1, to six and four years.²⁵ Al-Ṭabarī's questions from earlier jurists show that they agreed that the Islamic state should not conclude any peace agreement with the enemy that does not include paying tribute to the Islamic state unless it is limited in duration. Some jurists, such as al-Shāfi'ī, insist that the time limit must not exceed the duration of the Prophet's peace accord of al-Ḥudaybiya. And if there is a need to renew this peace agreement for another term, the Imām may do that. Al-Ṭabarī's quotation from Abū Ḥanīfa and his companions does not show that they require a time limit that does not exceed that of al-Ḥudaybiya.

There is also a possibility of concluding a peace agreement with an enemy person by offering him a pledge of security, which is a pledge of safe conduct for a limited time during which this person can move freely inside the Territory of Islam. This is mostly offered to merchants who buy or sell goods in Muslim provinces and then return back to enemy land. As al-Ṭabarī's sections on this topic show, many Muslim merchants used to get a pledge of security from the Byzantine authorities, for example, and trade inside Byzantine territory.

In general, al-Ṭabarī's sections that cover the topic of peace treaties and pledges of security clearly show that there was an understanding among jurists that concluding peace with the enemy can provide many benefits to Muslims. They used the expression '*alāl-naẓar lil-muslimīn* (based on the consideration of Muslims' [interests]) to give the Imām a religious approval in which he can have enough flexibility to conclude peace and avoid war with the enemy.

The Peace Agreement and the Concept of a "Third Territory"

The sections on peace agreements in al-Ṭabarī's *Book of Jihād* have special importance, since some modern writers on *jihād* in Islam use the notion of peace agreement, as legitimized by classical jurists, to prove that relations between the Islamic state and other states are based in principle on peace and that there is always a possibility of having peaceful relations with non-Islamic states.²⁶ Moreover, some writers look to the Shāfi'ī jurists' presentation of a third territory called *dār al-'ahd* or *dār al-ṣulḥ*, i.e., 'the territory of covenant' or 'the territory of peaceful relations,' as an indication that the classical model of *jihād* opens the door for permanent peace with non-Islamic states. Another view suggests that al-Shāfi'ī looked to the world as one territory and that no distinction of territories is necessary for relations between Muslims and non-Muslims.²⁷

To examine al-Shāfi'ī's views mentioned above, it is clear that al-Ṭabarī's quotations from al-Shāfi'ī do not show any recognition of a third territory, only the territories of Islam and war; but one can find this kind of recognition in the literature of the Shāfi'ī school.²⁸ However, one needs to identify the types of peace agreements legitimized by al-Shāfi'ī and other jurists in order to see if making a third category would change the picture from having only two

categories. If a third territory refers to a land in which its people have a peace agreement with the Islamic state without paying to the Muslim authority a tribute every year, then this type of peace is referred to, by al-Shāfi'ī and other jurists, by several terms, such as *muhādana*, *muwāda'a*, or *ṣulḥ*, all of which refer to a peace agreement. As al-Shāfi'ī states in section 6.1, such a peace agreement should only be conducted if Muslims are in a situation in which having a truce with the enemy becomes necessary, and also it should be limited in time, and its duration should not exceed the time of al-Ḥudaybiya, the peace accord conducted by the Prophet with the polytheists of Mecca. In addition, al-Shāfi'ī states that renewing the agreement is permissible only if Muslims still do not have power over the enemy, because according to al-Shāfi'ī, the basic principle of the obligation of *jihād* is to fight disbelievers until they either embrace Islam or pay the poll-tax. Thus, al-Shāfi'ī agrees with other jurists that an unlimited peace agreement with disbelievers is not permissible in the law of Islam. Also in section 6.1, al-Shāfi'ī states that if it is necessary for Muslims to have a peace agreement with disbelievers without specifying a time limit, the Muslim leader, the Imām, should have the right, by this agreement, to invalidate it at any time he wants.

In these above-mentioned cases, whether the territory of an enemy people who have a time-limited peace agreement with the Islamic state is called a Territory of Peace Agreement (*dār al-ṣulḥ*) or remains a Territory of War, it does not change the picture very much because no permanent peaceful relations have been established. In fact, Shāfi'ī jurists meant mainly by *dār al-'ahd* or *dār al-ṣulḥ* the territory of those who have accepted to pay the poll-tax to the Islamic state, thus changing their status to protected non-Muslims (*ahl al-dhimma*), and

only through this type of agreement can a permanent peace with non-Islamic states be established. Calling this territory *dār al-‘ahd* or *dār al-ṣulḥ* was done to resolve the problem of the status of such a territory. It was not regarded as a territory of Islam since Islamic laws were not applied and most of the people were not Muslims. At the same time, how could such a territory, regarded as the Territory of War, and its people have permanent peace with Muslims and not be enemies any more? At any rate, even with this recognition of a third territory that represents states of protected non-Muslims, the general understanding in the view of classical jurists, that Muslims should fight disbelievers until they either embrace Islam or pay the poll-tax, remains the same whether using two or three territories of classification.

As for al-Shāfi‘ī’s saying that the whole world represents only one territory, certainly al-Ṭabarī’s quotation of al-Shāfi‘ī does not encourage such conclusions, but it is possible that al-Shāfi‘ī refers to his disagreement with Abū Ḥanīfa regarding the unlawful activities conducted by Muslims in the Territory of War. According to Abū Ḥanīfa, if a Muslim commits an act punished by the fixed punishment of Islam (*ḥadd*) in the Territory of War and then comes back to the Territory of Islam, he should not be subject to the punishment, except for a loan or the forcible taking of property, which should be returned to its owner. On the contrary, al-Shāfi‘ī thinks that all Islamic rulings are applicable to the Muslim wherever he lives, and the person who commits such an act should be subject to the fixed punishment when he returns to the Territory of Islam. Thus, for al-Shāfi‘ī, the world is considered to be one territory in relation to the application of Islamic rulings on Muslims.²⁹

Another prominent theme in al-Ṭabarī's book that is expressed in several sections, such as those related to peace treaties and pledges of security, is the fulfillment of promises and the honoring of agreements, even those conducted with enemy combatants. The sections that cover the rules pertaining to duels between a Muslim combatant and an enemy combatant, for example, illustrate the point of honoring agreements. Although the jurists disagree on some of the rules pertaining to duels, there is a general agreement that if an enemy combatant requests a duel with one Muslim combatant, other Muslim combatants should not help their companion even if they fear he will be killed by the enemy.

The Jurists' Rules and the Principle of Reciprocity

One of the important questions that must be addressed when explaining the medieval contribution of Muslim jurists to the topic of *jihād* is to decide to what extent their legal discourse and the rules they formulated were influenced by actions taken by their enemy: was there any treatment of such questions based on the principle of reciprocity in dealing with the enemy? In al-Ṭabarī's *Book of Jihād*, most of the opinions expressed by jurists and their reasoning in deducing certain rules concerning the cases in question do not show any reliance on the principle of reciprocity. In other words, it appears that what the enemy does toward Muslims does not factor into the jurists' decision-making process. They seem to be more concerned with how to reach decisions that are aligned with Islamic teachings as represented in Qur'ānic verses, Prophetic traditions, and traditions from later authorities.

However, in other medieval works on *jihād* and *siyar*, such as that of Muḥammad al-Shaybānī, some cases are decided based on the principle of

reciprocity.³⁰ But despite this lack of consideration of the enemy's actions in formulating rules concerning specific questions, al-Ṭabarī's *Book of Jihād* clearly shows that many such rules and regulations reflect a reality in which there is a similar behavior expected from the enemy. For example, on the rules concerning the *musta'mans*, those enemy persons who are given a pledge of security, the jurists also address questions related to Muslims who are given a pledge of security by the enemy. In the sections that address the rules concerning prisoners of war and the possibility of enslaving captured enemy persons, the jurists also address questions related to Muslim captives who are enslaved by the enemy. This point becomes significant in the modernist critique of the classical model of *jihād*, as will be explained below.

Juristic Reasoning in the *Book of Jihād* and the Theory of Islamic Law

A last point to which al-Ṭabarī's *Book of Jihād* can contribute significantly is the debate among scholars of Islam today concerning the origin and development of Islamic law in its formative period during the eighth century. What was the main line of reasoning that early Muslim jurists used in formulating their own opinions? Were they very literal in their application of the texts of the Qur'ān and traditions from the Prophet? How about the cases in which there were no texts or earlier traditions to provide the needed rules? In the theoretical works of the principles of jurisprudence (*uṣūl al-fiqh*), Sunnī theorists formulated four main sources of Islamic law, two of which are textual, referring to the Qur'ān and Prophetic traditions as recorded in the canonical collections. The other two sources are needed in cases that presumably are not regulated in the religious texts. These are the consensus (*ijmā'*) among Muslim jurists during any specific

time on the rule concerning a legal case and the use of analogy (*qiyās*) to link a non-textual case with a textual one. But beyond this general acceptance of these four sources of Islamic law among the Sunnī schools of jurisprudence, some jurists developed other sources that remained controversial, such as juristic preference (*istiḥsān*), closing the means to harm (*ṣadd al-dharā'i'*), and the use of custom (*'urf*) as a legal source. Scholars debated the legitimacy of these sources for providing religious rules based mainly on their scholastic affiliation. While Shāfi'ī jurists insisted on having only the four main sources of law, Ḥanafī and Mālikī jurists in general accepted the inclusion of more than the four sources as legitimate sources of Islamic law.

The question that can be raised based on al-Ṭabarī's *Book of Jihād* is how much the line of reasoning among the jurists quoted by al-Ṭabarī corresponds to the theoretical understanding of the sources of Islamic law. Also, Muslim historians of Islamic law claim that in the early stage of the development of the Sunnī schools of Islamic jurisprudence, in the late seventh and eighth centuries, two schools became distinct from each other. The Iraqi school of Abū Ḥanīfa and his companions was called the People of Opinion (*ahl al-ra'y*) because of their limited usage of Prophetic traditions and their main reliance on their own discretion in ruling on legal cases. The second school was that of Medina, represented by Mālik b. Anas, which relied heavily on Prophetic traditions and thus was called the People of Prophetic Traditions (*ahl al-ḥadīth*). They did not use analogy or juristic preference except in very few cases. Al-Shāfi'ī, who studied with Mālik and some of Abū Ḥanīfa's companions later in his life,

developed a school that depended on the use of traditions as well as analogy in cases not regulated by the religious texts.

In contrast to the above traditional view of the early history of the Sunnī schools of jurisprudence, some Western historians of Islamic law present a different view regarding their early development. Joseph Schacht in his *The Origin of Muhammadan Jurisprudence* argues that early Muslim jurists, such as Abū Ḥanīfa, Mālik b. Anas, al-Awzā'ī, Sufyān al-Thawrī, and others, resorted to the dominant practice (*sunna*) in the province where they lived as the main source of legal judgment.³¹ The Qur'ānic text, of course, represented the first point of reference for them, but the many questions they faced as religious scholars who provided advice for the government and individuals developed within the new environment of the Muslim conquests in the second half of the seventh century and the eighth century. These questions are not addressed in the Qur'ānic text. The role of Prophetic traditions was not yet eminent and authoritative. Only when al-Shāfi'ī developed his legal discourse in the last quarter of the eighth century do we find the term *sunna* referring to Prophetic traditions and not the common practice of a specific community. A clear indication of the reliance on common practice was Mālik's authoritative usage of the "opinions of the people of Medina." For Mālik, whatever specific point of law the scholars of Medina before him agreed on is for him an authoritative source of Islamic law. Therefore, according to Schacht, beyond this general agreement on the Qur'ān and communal practice, these early jurists resorted to their own opinions to answer questions not addressed before. The use of juristic consensus (*ijmā'*) was not developed yet.

The point that relates to al-Ṭabarī's *Book of Jihād* is to decide to what extent this book can benefit the debate on the early development of the Sunnī schools of Islamic law. Schacht himself, in his introduction to the Arabic text that he published in 1933, comments that al-Ṭabarī's book provides a rare source for the legal opinions of early jurists such as al-Awzā'ī and Sufyān al-Thawrī that are not collected as such in most of the early works on *jihād* and *siyar*.³²

But one has to address the point that since al-Ṭabarī's *Book of Jihād* is in the genre of *ikhtilāf*, which is an exposition of the jurist's disagreements on specific legal questions on topics related to *jihād*, the jurists' opinions deal mostly with providing answers to these questions rather than analyzing and clearly presenting their rationale by which they reached a specific point of view. Unlike in the theoretical works of *uṣūl al-fiqh* where discussing legal methodology and philosophy are at the center of discussions among jurists, the books of Islamic jurisprudence (*furū'*) are mostly concerned with providing legal opinions on specific topics and providing a value for any action committed by a Muslim within the range of the accepted five legal categories of "obligatory, prohibited, commended, disliked, or permitted." But despite this limitation, in many sections of al-Ṭabarī's *Book of Jihād* his quotations from earlier jurists provide some explanation of the rationale in developing their own opinions concerning specific questions. Even al-Ṭabarī himself seems to have been interested in following the line of thought for each jurist in some of the sections on legal disagreement. In section 36.1, for example, al-Ṭabarī mentions the reason (*'illa*) that led each jurist or a group of jurists to articulate a specific response to the question of "the separation between a child and a person other than his mother from his blood

relatives who are both found in enemy territory.” One may also notice that al-Ṭabarī’s quotations from al-Shāfi‘ī include a more detailed explanation by al-Shāfi‘ī himself of his legal reasoning than jurists such as al-Awzā‘ī or Sufyān al-Thawrī. This might be because of al-Ṭabarī’s dependence on a written version of al-Shāfi‘ī’s opinions as transmitted to him by al-Rabī‘ al-Murādī, while al-Ṭabarī’s quotations from al-Awzā‘ī and Sufyān al-Thawrī might have relied only on oral transmission of their opinions.

In sum, despite the limitation that faces the reader of al-Ṭabarī’s *Book of Jihād* in terms of exploring the legal reasoning of the jurists, it can still provide a good source of information with which one can compare the actual reasoning of the jurists to see if it fits the theoretical framework that is found in classical works on Islamic legal theory and also to see if such reasoning corresponds to the assumptions made by modern historians of Islamic law on the early development of the Sunnī legal schools. Although one might be tempted to generalize about the whole corpus of the legal contribution of such jurists, including their opinions on many other topics, the aim of the following analysis is to reach conclusions that are limited to the jurists’ opinions on *jihād* based on al-Ṭabarī’s *Book of Jihād*.

One should mention first that it seems from the plethora of al-Ṭabarī’s quotations from the early Muslim jurists that there is a general agreement on the primacy of the Qur’ānic text as the main source of religious knowledge. In several sections of the book, one or more of the jurists refer to Qur’ānic verses as a source for affirming their own opinion. In addition, although the jurists represent different provinces and cities of the Islamic state at that time, such as Iraq, Syria, and Medina, at least in al-Ṭabarī’s *Book of Jihād* the well-known geographical

variations in Qur'ānic readings do not appear to constitute any factor in the disagreements among jurists. This can be explained simply by the fact that the quoted Qur'ānic verses do not have significant variations in readings that can lead to different interpretations.

However, one may notice that there are some disagreements on interpreting or applying the meaning of a Qur'ānic verse during the jurists' time. A clear example of this kind of disagreement is found in section 9.1 where the jurists disagree on whether to apply the rule mentioned in Q. 8:16 in which a Muslim combatant may retreat during combat from fighting the enemy if he intends to prepare himself for attack again or to join a group of combatants who intend to attack the enemy.

As for Prophetic traditions, one may agree with Schacht's thesis that al-Shāfi'ī was the jurist who made Prophetic traditions more prominent in terms of their usage as the second source of religious knowledge after the Qur'ān. The one jurist in al-Ṭabarī's book who resorts mostly to Prophetic traditions is al-Shāfi'ī. Someone who supports the traditional view that all jurists incorporated Prophetic traditions into their decision-making process might argue that since al-Shāfi'ī lived somewhat later than Abū Ḥanīfa, al-Awzā'ī, and Sufyān al-Thawrī, and also traveled to several provinces from Iraq in the East to Egypt in the West, he was able to hear and collect more Prophetic traditions than his predecessors. To support this view, it seems that the other jurists quoted in al-Ṭabarī's *Book of Jihād* also refer occasionally to traditions from the Prophet, including Ḥanafī jurists such as Abū Yūsuf. In such passages, it is clear that all jurists regard Prophetic traditions as authoritative in deciding the rule concerning the case in

question. This is the main argument of Muhammad Mustafa al-Azami in his critique of Schacht's thesis about the early development of Prophetic traditions as a source of legal judgments.³³ It might be valid to suggest, therefore, that, based on al-Ṭabarī's *Book of Jihād*, all jurists agreed on the authoritative status of traditions from the Prophet and that on matters related to *jihād* and *siyar*, the practice of the Prophet represented an example of action that later Muslim caliphs, provincial governors, and army commanders should follow. But it is clear from the disagreement among jurists that not all of them agreed on the authenticity of transmitting such traditions, and each jurist cites only what he considers to be authentic.

As for the Arabic term *sunna*, which Schacht and other Western scholars think refers first to the authoritative practice of the community and only later developed to mean specifically the Prophetic practice, the instances in which the term *sunna* appear in al-Ṭabarī's *Book of Jihād* show that they refer to the Prophetic *sunna*, especially in al-Shafī'i's references, but also to the general authoritative practice of the early Muslim community.

As for the third legal source, the consensus among jurists (*ijmā'*), one has to distinguish first between the unanimous agreements among jurists as listed by al-Ṭabarī at the beginning of most of the sections in his book and what the jurists themselves refer to in developing a legal opinion as based on consensus among scholars. Al-Ṭabarī's references to consensus represent his own choice as a jurist to regard specific legal cases as unanimously agreed upon by earlier jurists. But even this alleged *ijmā'* expressed by al-Ṭabarī does not precisely fit the legal category of consensus among jurists. This is because a valid *ijmā'* requires the

unanimous agreement of all jurists during a specific time on the rule concerning a legal case. Al-Ṭabarī does not include the opinions of Aḥmad b. Ḥanbal, the founder of the Ḥanbalī school of law; Dāwūd al- Zāhirī, the founder of the Zāhirī school of law; or the Shī'ī Imāms who developed the Twelver Shī'ī school of law. It is true that for al-Ṭabarī himself, the jurists that he cites are the only ones that he thinks should be cited in terms of their authority and legal knowledge. The biographers of al-Ṭabarī's life and works mention that he did not regard Aḥmad b. Ḥanbal as a jurist but rather as a traditionist. This point has an impact on modern discussions of the whole corpus of traditional jurisprudence in Islam. Some modernists argue that in many books of Islamic jurisprudence, many rules are presented as based on consensus among scholars but in fact they refer only to the agreement among the most established schools and do not refer to the opinions of jurists who belong to other schools. In the case of al-Ṭabarī's *Book of Jihād*, the consensus among medieval Sunnī jurists on the possibility to wage an offensive war under the leadership of the caliph, referred to as the Imām, was challenged by the Shī'ī school according to which waging an offensive *jihād* could be done only under the Prophet himself or an infallible Imām, one of the twelve Imāms of Shī'ī Islam.

The other aspect of the use of *ijmā'* as a legal source can be traced in al-Ṭabarī's *Book of Jihād* to the jurists themselves as they express that they have reached certain decisions based on consensus. Among the many legal opinions in the *Book of Jihād*, only a few of them appear to be based on scholastic consensus. In a few instances, the jurist might refer to the unanimous agreement among earlier jurists as the basis for developing his legal opinion on a specific case.

There are, however, more references to what is called in Islamic legal theory *ijmā' sukūṭī* (consensus based on the lack of a contrary opinion). The jurists might indicate to the inquirer that they have not heard of any earlier authority objecting to doing what is in line with their own opinion. These references to opinions based on legal consensus do not appear to be very frequent in al-Ṭabarī's *Book of Jihād* compared with the majority of cases that are decided based on other sources.

As for the fourth source of Islamic law among the Sunnī schools, the use of analogy (*qiyās*) to reach a legal decision by comparing a novel case with a textual one, this is mentioned several times in al-Ṭabarī's book, specifically by al-Shāfi'ī and Ḥanafī jurists. Al-Shāfi'ī, for example, indicates in section 3.1 that his legal opinion in which he states that Muslim combatants should not target monks found in enemy territory is based on a tradition from Abū Bakr, the first caliph after Muḥammad, and not a *qiyās*, meaning not an analogy made by comparing the case of monks with that of women and children. As stated above, al-Shāfi'ī's aim in denying the possibility of *qiyās* is to argue against those who think that the reason for not targeting non-combatants is their state of non-combatancy more than anything else. However, these clear references to *qiyās* are very limited in number. There might also be cases that are decided on legal analogy without mentioning the term *qiyās*.

But the overwhelming majority of legal cases in al-Ṭabarī's *Book of Jihād* do not appear to be based on any of the four main Sunnī legal sources. Since this book lies in the genre of *ikhtilāf*, the bulk of legal cases are disagreed upon by jurists and consequently we do not expect for the most part a Qur'ānic verse or a

well-known and accepted Prophetic saying or practice to be included within the juristic discussions on such points of disagreement. In other words, most of the cases that are cited by al-Ṭabarī from earlier jurists are not directly decided based on a Qur'ānic verse or a Prophetic tradition. Moreover, only a few of these are decided based on *ijmā'* or *qiyās*. If the case that is presented to the jurist is a novel one, then one expects that jurists before him did not have anything to say about it, and in many such cases no analogy is possible because there is no textual case in which its efficient cause (*'illa*) for having the rule is also found in the new case.

As a matter of necessity and need, the jurists had to respond to the questions addressed to them by providing answers that presumably were applied by the inquirers or specifically by political and military authorities. Therefore, we do not see in al-Ṭabarī's *Book of Jihād* instances in which a jurist declines from providing an answer to a question because of lack of evidence based on the main four sources of Islamic law. Consequently, the majority of the cases are decided based on what amounts to 'juristic preference' in legal terminology. It is a kind of legal reasoning in which a jurist provides an opinion on a legal case based on his own discretion and in which one cannot find a clear link to specific textual evidence, consensus among earlier jurists, or an argumentation based on analogy.

Al-Shāfi'ī himself declares in his theoretical work *al-Risāla fī Uṣūl al-Fiqh* (*The Treatise on the Principles of Islamic Jurisprudence*) that to decide on cases that are not regulated in the texts of the Qur'ān and Prophetic traditions, the only two legitimate sources to judge such cases and to establish a religious rule are *ijmā'* and *qiyās*. But in many of the passages taken from al-Shāfi'ī's major

work of jurisprudence, *al-Umm*, as quoted by al-Ṭabarī, al-Shāfi'ī resorts to juristic preference to reach his legal opinions rather than analogy.

One might suggest, however, that such juristic preference is somewhat guided by Islamic principles and the general meanings of the religious texts, and it does not necessarily represent a purely subjective view that is independent from such general meanings. It depends on each jurist's understanding of such principles and the reasons behind or objectives (*maqāṣid*) of the textual rulings. For example, in section 39.1, al-Ṭabarī mentions the case in which the enemy provides a pledge of security to a Muslim captive and tells him to go the Territory of Islam and bring a ransom in money or property, and if he does not bring them the ransom, he should return to enemy land and be considered a prisoner of war again, and the Muslim captive agrees to such a condition. Should he, after being released from captivity, fulfill his promise to pay them the ransom or otherwise return to the state of captivity? Here one can consider this case as non-textual in the sense that the jurists do not cite a specific Qur'ānic verse or a Prophetic tradition that addresses the case in question. But the jurists have a general understanding from the Qur'ānic verses and Prophetic traditions that a Muslim should fulfill his promise to people, even in dealings with enemy combatants. Therefore, this general principle can be applied to the case. All the jurists quoted by al-Ṭabarī agree that a Muslim captive should fulfill his promise and pay the ransom to them. A minority view suggests that he should return to captivity if he does not provide the ransom, but the majority view apparently depends on the understanding that a Muslim captive has the right to escape from enemy hands,

and therefore the lack of ransom should not lead him to voluntarily return to a state of captivity.

One can conclude, therefore, from analyzing the juristic reasoning that is included within al-Ṭabarī's quotations from the jurists that the theoretical framework developed by al-Shāfi'ī to strictly standardize the sources of Islamic law to include only the four main sources does not appear to be successfully applied in dealing with legal cases related to *jihād* and *siyar*, even by al-Shāfi'ī himself. One cannot ignore the fact that such theorization developed out of intense debates among jurists and critique and counter-critique such as al-Shāfi'ī's accusation of Mālik and his followers of not following Prophetic traditions. If this is the case, then the possible divergence between theory and practice might challenge the traditional view that the theory of Islamic law was constructed based on studying and analyzing actual legal cases in different areas of Islamic law. At least in many such cases in *The Book of Jihād*, the theorization of al-Shāfi'ī does not seem to hold very well when responding to specific questions.

In conclusion, al-Ṭabarī's *Book of Jihād* demonstrates that, despite the significant disagreements among Sunnī Muslim jurists regarding the legal cases related to the topic of *jihād*, they nevertheless unanimously agreed on a model of *jihād* by which relations between the Islamic state and other states are based on warfare unless they either embrace Islam or pay the poll-tax, and that a peace agreement may be conducted in cases of necessity and only for a limited time. This state of warfare, according to the majority of jurists represented in al-Ṭabarī's *Book of Jihād*, however, is a direct result of the presumed hostility of non-Muslim states and their armed conflict with the Islamic state.

The Medieval Doctrine of *Jihād* and Its Relevance to Modern Islamic Political Movements

A final issue must now be addressed: what is the relevance of the classical doctrine of *jihād* to modern times? Should one consider this doctrine as representative of Islamic law (*sharī'a*), and therefore it can be applied at any time an Islamic state wills to implement Islamic teachings on its subjects, or should one regard it as conditioned by its context and history and thus not the final representation of Islamic teachings that define relations between the Islamic state and other states?

Modern positions toward the classical model of *jihād* as stated by the jurists in the *Book of Jihād* represent a spectrum of ideas and judgments. One can distinguish within this spectrum two positions towards the medieval formulation of the theory of war and peace in Islam, one that is affirmative and the other that is rejectionist. The rejectionist position represents those Muslim writers and Western scholars who try to prove that the original teachings of Islam, as found in the Qur'ān and the life of Muḥammad, call for peaceful relations between the Islamic state and other states and that war is legitimized only for the defense of the Islamic state against aggression.³⁴ According to this view, a development occurred in the doctrine of *jihād* during the history of Islam through which the view of expansion and forcing all non-Muslims to pay the poll-tax or to face death emerged as the representative of Islamic teachings on this issue. Therefore, one needs to stick to the original teachings of Islam and implement those in the modern life of Muslims.

The affirmative position represents a group of Muslim writers and Western scholars who assert that the classical juristic literature on *jihād* does not deviate from the authentic teaching of the Prophet and that this model represents “Islamic international law” which can be applied at any time by an Islamic state. But some of the writers in this group recognize the difficulty in implementing such a model of international relations today. They try to show that the relationship between the Islamic state and other states, according to the classical juristic model, is based on peace rather than warfare and thus open the door for possible compatibility of the classical model with modern political systems.³⁵ These writers use some quotations from al-Shāfi‘ī, as mentioned above, or al-Awzā‘ī to prove their case. But even with the relative disagreements among jurists, the main argument for the classical doctrine of *jihād*, mentioned above, remains compelling, and al-Ṭabarī’s *Book of Jihād* indicates clearly such consensus among those jurists.

Other writers who hold the same affirmative position toward the classical view of *jihād* state clearly that the relationship between the Islamic state and other states is not peaceful in principle from an Islamic point of view, as the jurists indicated, but that in modern times there is room for peace agreements or treaties that make this relationship as peaceful as possible.³⁶ But here also this view faces a serious problem when implementing the classical model in modern times. This problem is mainly the impermanent status of the peace agreements sanctioned by the jurists. What would be the political and diplomatic challenge in the relationship between the Islamic state and other states if the latter know that the

peace agreement with the Islamic state is only temporary and that it might not be renewed for a next term?

There are also other problems facing the application of the classical model of *jihād* in modern times. If one needs to follow the main acts and rules of war provided by the jurists and believed to be practiced by the Prophet of Islam himself, does this mean that in case of war the Muslim army should take disbelievers' women and children as captives and enslave them because they would be regarded as booty for Muslims? Some Muslim writers who hold the affirmative position might answer this last question by emphasizing the point that not all the actions taken by the Prophet are regarded as obligatory and part of the Islamic law (*sharī'a*), and that according to the rules of Islamic jurisprudence, only those acts that are done by the Prophet with the intention of legislating a religious rule should be followed.³⁷ But in this case, one might ask on what basis should we accept the Prophet's actions regarding prisoners of war, for example, as part of Islamic law but those actions regarding the capture of women and children as not? In other words, how can we prove that the practice of Muḥammad toward prisoners of war aimed at legislating a universal Islamic rule but the practice of enslaving women and children did not? Should we depend on a modernist argument to say that there are no such practices today during times of war between nations and that slavery has been already been abolished? If this is the case, then what is the point in referring to Prophetic practice or the interpretation of medieval jurists on matters related to the conduct of war and peace?

Most Islamists who hold the affirmative view toward the classical doctrine of *jihād* do not depend at least in theory on any modernist argument to reject such

practices of medieval armies to enslave the enemy's women and children. Rather, they try to prove that the teachings of Islam are against slavery and the degradation of women in any shape or form and that such practices of early Muslims were conditioned by the historical context in which they lived and the treatment of the enemy based on the principle of reciprocity. But if such practices were presumably approved by the Prophet and followed by his Companions, and there is no clear distinction by which one can argue that those Prophetic actions regarding the prisoners of war are intended to be part of the *sharī'a* while those regarding the enslavement of women and children are not, then applying the principle of reciprocity in treating the enemy and taking into consideration the historical context of the seventh and eighth centuries can be expanded to include rules used to decide the fate of prisoners of war, or even enforcing a yearly payment of a poll-tax on non-Muslim subjects of the Islamic state or on states that have a permanent peace treaty with the Islamic state. The affirmative Islamist position might reject such expansion by arguing that the payment of the poll-tax (*jizya*) is mentioned in the Qur'ān, and therefore the rule was established not only based on the current practice at the time but essentially based on a Qur'ānic instruction, while there are no Qur'ānic verses or Prophetic traditions that clearly consider practices such as the enslavement of enemy women and children during the time of war as part of the universal Islamic rules of conduct. In the final analysis, therefore, the main disagreement between the affirmative position and the rejectionist one rests on how to interpret the religious texts that provide rules on matters related to war and peace in Islam.

Let us go back to the first position of rejection held by several writers who recognize the development of the doctrine of *jihād* from one that was defensive in nature to a platform for expansionist policy during the Classical Period of Islamic thought. Here one needs first to know how these writers reach this conclusion, since the jurists depended on Qur'ānic verses and traditions from the Prophet in order to formulate their view. The key to these writers' approach is their dependence on those Qur'ānic verses and selected Prophetic traditions relating to *jihād*, constructing from them the Islamic point of view and then evaluating the jurists' model accordingly.

Several Qur'ānic verses deal with fighting disbelievers; only one specifically requires them to pay the poll-tax. In contrast, other verses call for the peaceful treatment of disbelievers and to refrain from using force or coercion in converting them to Islam.³⁸ In the theory of Islamic law this apparent contradiction is called *ta'āruḍ*, in which several verses in the Qur'ān or *ḥadīth* show an apparent contradiction or ambivalence in meaning; from an Islamic point of view, it is not considered a real contradiction since God's commands, the ultimate source of Islamic law, do not contradict themselves, and therefore this apparent tension of opposing meanings should be reconciled. Scholars of Islam use several methods to achieve this goal. For some of the Muslim writers who hold the idea of development in the classical doctrine of *jihād*, such as Maḥmūd Shaltūt, the late Sheikh of al-Azhar and Rector of Azhar University in Cairo, the main problem for classical jurists was that they used a juristic procedure called *naskh* (abrogation) to ease the tension between the opposing Qur'ānic verses that relate to *jihād*. These jurists thought that since most, if not all, of the Qur'ānic

verses that call for peaceful relations with disbelievers were revealed to the Prophet before the verses that call for fighting them and forcing them to pay the poll-tax, in the matter of *sharī'a* the later verses abrogate the rules of the earlier ones. For example, the verse which calls for Muslims to refrain from fighting polytheists when Muslims were in Mecca is thought to be abrogated by the verses that call for fighting them when Muslims had power in Medina.³⁹ For Shaltūt, the abrogation of these Qur'ānic verses by jurists has led to the view that fighting in Islam has an aggressive, expansionist character; however, by taking into consideration all the verses regarding *jihād* and fighting in Islam, the picture would be different.

Here Shaltūt and other writers who share his position use another method called *jam'* (harmonization) to solve the problem of the apparent contradiction or opposition in meaning of the Qur'ānic verses. *Jam'* is a method by which all the verses regarding an issue in Islamic jurisprudence are used without leaving any one of them abrogated, then certain relations between the verses are established by the jurist so that each one is thought to have its specific case of application. Shaltūt, for example, looks to verses that call for peaceful relations with non-Muslims as representing the general ruling in Islam that should be followed at any time or place, while the verses that call for fighting disbelievers are thought to be specific for the case in which an aggression against the Islamic state has happened. Therefore, the notion of *jihād* in Islam becomes purely defensive in nature.

There are some verses in the Qur'ān that call for fighting disbelievers and give an indication that the latter had transgressed against Muslims, such as verses

1-15 in chapter 9, which call on Muslims to fight all Arab polytheists until they either embrace Islam or face death. Clearly there is an indication that the polytheists initiated the transgression against the Prophet and his Companions, yet verse 29 of the same chapter (9), which calls for fighting the People of the Book until they pay the poll-tax or embrace Islam, does not indicate that they had already transgressed against Muslims. The historians of the life of the Prophet mention that the Prophet took the poll-tax from the Christians of Najrān and the people of Yemen without specifying what acts of aggression these people did against Muslims.⁴⁰ Therefore, it seems that the historical evidence does not provide us with a clear indication that all the wars of the Prophet were defensive in nature. But here, according to the writers who emphasize the defensive nature of *jihād* in Islam, the traditions that do not correspond to the Qur'ānic view would be rejected since the main argument is based on Qur'ānic verses and not on Prophetic traditions or reports from the biography of the Prophet (*sīra*), at least not all of them.

Recognizing some of the problems in the previous approach, several scholars of Islam have developed another position which may be regarded as an expansion or modification to the idea of defensive *jihād* in Islam. This position takes into consideration the political and military environment in the Middle Ages. For example, taking tribute or poll-tax from the enemy was practiced not only by the Islamic state, but also by the Byzantines, the Persian Sasanians, and others.⁴¹ Taking women and children as captives and subjecting them to slavery were practiced by all the states at that time. One can say that there were some rules that organized the relations between different states or empires, but certainly there

was not a conception of international law as in modern times. The empires did not agree on specific geographic borders, but rather they could be expanded through invasion and conquest. Therefore, relations between states at that time were based on warfare. When Islam came into being as a political entity, it was necessary to act according to the prevailing political system of the time. The Byzantine and the Persian Sasanian empires during the time of Muḥammad represented by their existence, and not necessarily by a specific act of aggression, a hostile force that could fight Muslims at any time. The same picture is found during the time of the ‘Abbāsīd caliphate when the jurists lived. Therefore, the classical model of *jihād* was a continuation of early Islamic views and actions, beginning from the time of Muḥammad and his Companions.⁴²

According to this position, there is no need for Muslim scholars to try to prove that all the military actions of the Prophet and early Muslims were defensive or to face the problems that might arise from forcing the Qur’ānic text to refer to *jihād* or fighting in Islam as being only defensive. If one understands the nature of international relations in the Middle Ages, one can understand why the Islamic state forced other states to pay tribute. The issue of security for the Islamic state and its subjects was the main concern for the Prophet and the Caliphs after him, and this security could not be achieved without using the principle of equal treatment.⁴³

According to this view, the particularity of the verses that call upon disbelievers to embrace Islam or pay the poll-tax stems from its time and historical circumstances, and therefore the text itself becomes applicable only in the case where providing security for the Islamic state necessitates such actions.

And since in modern times a state with a majority of Muslim citizens can keep its security by being part of the world community of nations, fighting becomes only necessary to defend the sovereignty of the state and the security of its subjects.⁴⁴

One might criticize this view as reducing the importance of the religious factor in the notion of *jihād* in Islam. Was there not any religious obligation for Muslims to spread the message of Islam through *jihād*? The defenders of this position would answer this question by acknowledging that spreading the message of Islam was and remains an important religious obligation, just like security, and according to Islamic teachings, especially the Qur'ānic verse which calls upon Muslims to fight "in order for God's Word to be more supreme" (9:40), the purpose is to fight any political entity that does not allow the message of Islam to reach the people so they can listen to this message and decide whether to choose Islam or not. During the time of the Prophet and after, the type of non-Muslim governments and states in existence did not allow the message of Islam to reach people, and therefore it was necessary to deal forcefully with these governments to provide for the security of the Islamic state and to allow their subjects to listen to the message of Islam. According to this understanding, an Islamic state in modern times would be hostile to a state that is governed by authoritative rule which does not allow the message of Islam to be heard by the people of that state, while a democratic state, for example, would not be hostile to the Islamic state since the message of Islam can reach the people; therefore the notion of having an armed conflict becomes unnecessary, and indeed, irrelevant.

Some Notes on the Present Translation

As indicated previously, this translation of al-Ṭabarī's *Book of Jihād* is based on a microfilm copy of the original manuscript. I refer to the folio numbers of the manuscript by putting each number within brackets before the first word in that specific folio. The manuscript's scribe does not divide al-Ṭabarī's *Book of Jihād* into chapters but rather writes the topic sentence for each unanimous agreement or disagreement at the center of the page to indicate the shift into a new section. I kept these topic sentences at the center of the translation pages typed in bold and provided section numbers typed within brackets. Since the cases of disagreement usually follow a general agreement, according to al-Ṭabarī's arrangement, I assigned a number to each section in which the whole number refers to a section of unanimous agreement and a decimal number to a section of disagreement. My intention is to have a numerical connection between the sections of unanimous agreement and those of cases of disagreement in order to link together the jurists' opinions that address the same general topic. In most works on Islamic jurisprudence, all the points of agreement or disagreement among jurists in relation to a specific topic are included within one section of the work.

I did not find it necessary to duplicate Schacht's work of authenticating the juristic opinions in the text by examining the primary sources of al-Ṭabarī. Nevertheless, when a jurist's opinion as quoted by al-Ṭabarī might be more readily understood by going back and reading the entire relevant passage from the original source (so as to discern its context), then this was done.

Certain passages contain ideas or concepts mentioned in the Qur'ān though not cited; in these cases I have given notes referring to the relevant Qur'ānic verses.⁴⁵ For the Prophetic traditions (*aḥādīth*; sing. *ḥadīth*) referred to in the text, I have provided notes to indicate the traditionists (*muḥaddithūn*) who included them in their collections. Also, references to historical events occurring at the time of the Prophet as recorded in the great work *Sīrat Ibn Ishāq* have been provided.

Literal Translation and the Use of Interpolations

I have followed a literal rendering of the text as much as possible, as this is the only way to remain loyal to the jurists' original ideas, reasoning, and lines of thought. This method is not without its challenges. Al-Ṭabarī's book consists mainly of questions addressed to jurists and their answers to them. Naturally enough, the author/compiler (himself an accomplished Muslim jurist) expected his readers (presumably other jurists and scholars) to understand the significance of these legal questions and their underlying religious ideas familiar to the people of that time. Aside from this, differences in grammatical structure and literary expression between Classical Arabic of the eighth-ninth centuries C.E. and modern English are obvious; thus, for the modern translator, it is often necessary to interpolate words and phrases to clarify, amplify, or even complete the meaning in English. Accordingly, I have added words within brackets ([]) to the text for clarification or to suggest a modern English equivalent for an Arabic phrase or concept. For the more difficult passages, I have provided explanatory notes.

Where deemed useful, I have given the English transliteration of Arabic words or phrases in parentheses, especially in the case of Islamic legal terms (e.g.,

“...in the Territory of Islam (*dār al-islām*)...”). Most of these – and many other Arabic words and phrases – are further elucidated in the “Glossary of Arabic Terms” appearing at the end of the translation.

The Rendering of Certain Islamic Legal Terms

Such terms, for the most part, have standard meanings recognized and used by the majority of Muslim jurists (including al-Ṭabarī); again, see the Glossary. However, some of these terms as used by al-Ṭabarī deviate (to some extent, at least) from their technical (or “lexical”) meanings.

“The disbelievers” (*mushrikūn* or *kāfirūn*). A case in point is the word *mushrikūn* (sing. *mushrik*). This term is used by all Muslim jurists in al-Ṭabarī’s book to refer to “the enemy people,” i.e. those with whom Muslims were at war (*ahl al-ḥarb*), be they polytheists or “People of the Book” (*ahl al-kitāb* – Jews and Christians and other scripturalists).⁴⁶ However, in Classical juristic usage, unlike the Qur’ānic usage in which *mushrikūn* refers only to polytheists, *mushrikūn* is a synonym for *kāfirūn*, a term used in the Qur’ān to indicate those who have actively *rejected* the message of Islam. Therefore the two terms (from the juristic point of view) could be interchangeable: every *mushrik* is, by legal definition, a *kāfir*, and vice versa. But the lexical meaning of *mushrik* is “one in the act of worshipping another god(s) besides Allah,” while *kāfir* refers to “one in the act of rejecting Islam.”

The difference in meaning is important for purposes of translation. Regarding the word *kāfir*, several English words have been employed by scholars: “infidel,” “unbeliever,” and “disbeliever.” Since *mushrik*, as indicated above,

means not only "pagan" in classical usage but any *kāfir*, some English writers have used "unbeliever," "disbeliever," or "infidel" to translate the word *kāfir*. These are, indeed, technically correct translations, yet one can also appreciate the different nuances of meaning between the English words *unbeliever* and *disbeliever*.

According to Webster's Dictionary, both words are synonyms; however, *unbelief* implies merely a *lack* of belief, whereas *disbelief* suggests the *positive refusal* to believe.⁴⁷ What makes this difference significant, as I see it, for the purposes of translating al-Ṭabarī's book (or any other classical juristic work on *jihād*), is that there is a clear emphasis in al-Ṭabarī's treatment of the subject of *jihād* on who among non-Muslims should be fought and under what conditions fighting is permissible. One clearly notes in section 2 of the book that the invitation to embrace Islam before fighting non-Muslims represents a strong Prophetic tradition well-known by all jurists, and even in the cases where there is disagreement among jurists regarding the obligation of invitation to Islam before fighting (section 1.1), those who do not find the invitation to Islam to be obligatory have assumed that non-Muslims at the jurists' time, such as the Byzantines or others, have already heard about the Islamic religion and refused to embrace Islam and that therefore they should either pay the poll-tax or face Muslims in battle. No one among the jurists mentioned by al-Ṭabarī legitimizes the killing of a non-Muslim who has not, according to their view, heard the message of Islam and refused to become a Muslim. Therefore, in my view, "disbeliever" is a better translation of *kāfir* than "unbeliever" and reflects more precisely the intended meaning by medieval jurists.

(*'ilj*). Another word that is used in al-Tabari's book is *'ilj*,⁴⁸ meaning "(one of) the enemy," and for the purpose of differentiation between *mushrik* and *'ilj*, in its original usage, *'ilj* refers to a non-Muslim of non-Arab origin. But in *The Book of Jihād*, the jurists use the word as a synonym for a *kāfir*. Therefore, I use the term disbeliever to translate *'ilj*.

"Booty" (*ghanīma* or *fay'*). The Arabic word *ghanīma* means "booty" (or "spoils of war"), while the word *fay'* means technically "property taken from non-Muslims without war or violence";⁴⁹ yet in several places, the two terms are used interchangeably, *ghanīma* sometimes referring to enemy property confiscated while no state of war exists, and *fay'* being used for "spoils of war" or booty. It seems, however, that *fay'* is used in a more general sense than *ghanīma*, and, in *The Book of Jihād* at least, *fay'* more likely refers to any property taken from enemy territory, whether during a time of war or not.

"Horses" (*kurā'*). Yet another problematic word is *kurā'*, which has the lexical meaning of "hoofed (ungulate) animals" but in al-Ṭabarī's text is used mainly for "horses." For example, sections 16 and 16.1 refer first to the jurists' agreement that one of the enemy living in the Territory of Islam with a pledge of security may take animals with him to the Territory of War, then it refers to the disagreement regarding the *kurā'* and *silāḥ* ("weaponry"). The coupling of *kurā'* with *silāḥ* indicates that, contextually, the animals referred to were used in fighting, i.e. horses and possibly camels, and because of that, the enemy person who has been given a pledge of security by Muslims would not be permitted to take weapons and horses into the Territory of War. It seems that this usage was

adopted by many medieval jurists to the extent that some regarded the technical meaning of *kurā* 'as exclusively "horses."' ⁵⁰

THE BOOK OF THE DISAGREEMENT AMONG MUSLIM JURISTS
THE BOOK OF JIHĀD

In the Name of God, Most Gracious, Most Merciful:

The Book of Jihād

**[Introduction: On the Interpretation of Qur'ānic Verses
 Dealing with the Message of Islam]**

With the praise of God we begin and seek help.

Truly He is the guardian of our protection [from evil] and the provider of our success; and may God bless and grant peace upon Muḥammad the Prophet and his family.

God said in His revelation to His messenger:

Before this We wrote in the Psalms, after the Message (given to Moses): "My servants the righteous shall inherit the earth." Verily in this (Qur'ān) is a Message for people who would (truly) worship Allah. We sent thee not, but as a Mercy for all creatures. [Qur'ān 21:105–107]

God also said:

We have not sent thee but as a universal (Messenger) to men, giving them glad tidings, and warning them (against sin), but most men understand not. [Qur'ān 34:28]

Thus, God informed His Prophet and Messenger to His creatures that He had sent him to all mankind, giving them glad tidings and warning them; and God informed His Prophet and Messenger of the privileges that he had received above

[all] His previous prophets and messengers. All His previous prophets and messengers were sent only to specific people or a generation of humankind, and God privileged our Prophet with propagating the general message [of Islam] and the invitation to all [people] which demonstrated, from Allah, his rank and honor. God sealed, with him, [all] revelation and made his nation (*umma*) the best among all previous nations. He said:

Ye are the best of Peoples, evolved for mankind, enjoining what is right, forbidding what is wrong, and believing in Allah. [Qur'ān 3:110]

Moreover, God assured His Prophet that His religion would be supreme among all other religions, and His people over all other peoples. Thus He said:

It is He Who hath sent His Messenger with Guidance and the Religion of Truth, to prevail it over all religion, even though the Pagans may detest (it). [Qur'ān 9:33; 61:9]

Then, He did not make him die until He showed his followers the ways [of righteousness], cleared to them the roads [to success], and introduced them to the laws and rules of dealing with peoples of other religions . . . ⁵¹ [2] to the enemy until they put them to death, whatever they do they are allowed. (Narrated by al-Lu'lu'ī from them.)

Al-Ḥasan al-Baṣrī said: "When God said,

If any do turn his back to them on such a day . . . ' [Qur'ān 8:16]

the Qur'ānic verse was referring specifically to the day of Badr."⁵² (Narrated to us by Abū Kurayb, who said: "[This was] narrated to us by Wakī' from al-Rabī' b. Ṣabīḥ from him [i.e., al-Baṣrī].")

On the Authoritative Practice (*sīra*) for Fighting the Polytheist People

[Section 1]

There is unanimous agreement [among Muslim jurists] that the Messenger of God did not fight with his enemies from among the polytheists before [first] making the call [to embrace Islam] and showing proof [of this invitation], and that he used to command the leaders of his detachments to invite [to Islam] those whom the calling did not reach.

[Section 1.1]

They disagreed on the obligation of invitation by Muslims [to embrace Islam] [in the time of the jurists]⁵³ when waging war against the polytheist people.

Concerning the Byzantines, Mālik b. Anas was asked: "Should they be invited [to embrace Islam] before fighting with them?" He replied: "I prefer that they not be fought until invited [to embrace Islam], if that is possible." Then, it was said [to him] that "they [the Byzantines] might be invited to [embrace] Islam, and then they themselves would invite the Muslims to [embrace] Christianity." He said: "They have done their obligation if they invite them." (Narrated to me by Yūnus from Ashhab from him).

Al-Shāfi'ī said: "From the Messenger of God's command of incursions and night raids, [we] can infer that inviting polytheists to [embrace] Islam or to [pay] the poll-tax (*jizya*) is obligatory for the one whom the invitation did not reach. As for the one whom the invitation [to Islam] has reached, the Muslims may put him to death before he has been [formally] invited. And if they invite him, they are permitted to do so, because if they are allowed to stop fighting him

for a long period of time [for a truce or peace agreement], therefore not fighting him until he is invited is also accepted. As for those whom the invitation of the Muslims did not reach, it is not permissible to fight them until they have been invited to belief (*īmān*) if they are not People of the Book (*ahl al-kitāb*); or to believe or give tribute, if they are People of the Book, and I do not know, nowadays, of anyone whom the invitation has not reached unless there is, behind our enemies who are fighting against us, a nation of polytheists, then the invitation might not have reached them. Perhaps there is, beyond the realm of the Byzantines, the Turks, or the Khazars⁵⁴ a nation of which we do not know. Therefore, if one of the Muslims were to put to death one of the polytheists whom the invitation did not reach, the Muslim should pay, if [the polytheist] was Christian or Jewish, the blood money (*diyya*) of a Christian or Jew, and if he was a pagan or Zoroastrian, [the Muslim] should pay the blood money of a Zoroastrian.⁵⁵ (Narrated to us by al-Rabī' from him [al-Shāfi'ī].)

Abū Ḥanīfa and his companions said: "If the leader of the army or a detachment goes on a military expedition and faces the enemy, there is no harm if they charge at them at night or during the day. Or they might surprise them at night and they might not invite them to [embrace] Islam because the invitation has [already] reached them." (This is the tradition of al-Lu'lu'ī from them.) It is also the opinion of Abū Thawr.

[Section 2]

All [Muslim jurists] agreed unanimously that when the two armies face each other, the Muslims may shoot at the polytheists by throwing arrows, stones, striking with swords, stabbing with lances, or inundating them with water. They agreed that to act so as to weaken them with everything that could be a way of achieving victory over them [is permissible], unless there are Muslim captives, children, or women among them.

[Section 2.1]

They disagreed on this [action] if there are Muslim children or captives with them and on shooting at them with what would not be safe from hitting one whom [Muslims] are not permitted to put to death deliberately.

When Mālik was asked: “Which one of these is more preferred to you: guarding the frontier station or making incursions into enemy territory?” Mālik said: “Regarding incursions in the enemy’s territory, I am not sure.”

Ibn Wahb said: “[This is so], as he [Mālik] dislikes such actions. [Mālik said]: ‘As for moving into the enemy’s land for attacking [enemy combatants], that is more preferable to me.’” (Narrated to me by Yūnus from Ibn Wahb from him.)

Al-Awzā’ī said: “If the disbelievers use Muslim children as a [protective] shield, they [the Muslims] should stop shooting at them, and if one of them comes [within sufficient range],⁵⁶ [the Muslims] should shoot at him. God [3] said to His Messenger and to the believers regarding the polytheists in Mecca:

Had there not been believing men and believing women whom ye did not know that ye were trampling down, and on whose account a crime would have accrued to you without (your) knowledge. [Qur'ān 48:25]

Thus, how can Muslims shoot at those whom they cannot see from among the polytheists and know that if they shoot at them, they will hit Muslim children?" (Narrated to me by al-'Abbās from his father, from him.)

He [the father of al-'Abbās] said: "Furthermore, when asked about a group of Muslims who face one of the enemy's ships among whom are Muslim captives, 'Would you disapprove if they burn it with fire?' Al-Awzā'ī said: 'Burning it with fire should cease as long as it contains Muslim captives.'" Mu'āwiya narrated to me from [Abū Ishāq] al-Fazārī, saying: "Al-Awzā'ī said: 'Deal with your enemy as much as you can unless you take him [captive]. When you take him [captive], you do not do that [with him].'" He [al-Fazārī] said: "I asked al-Awzā'ī: '[If there is] a fortress that the Muslims have reached and besieged and that contains Muslim captives, is it allowable to shoot into it fire, arrows, and mangonels?' He replied: 'There is no harm [in it], and if someone is hit, it is an unintentional [killing] (*khaṭa*).' I asked: 'What if they come forward with [the Muslim captives] using them as [human] shields?' He replied: 'Shoot at the enemy, and if you hit a Muslim, it is unintentional and you have to pay expiation (*kaffāra*).'"⁵⁷

Al-Thawrī was asked about a fortress reached by Muslims: "Is it allowable to shoot at it with mangonels and fire? And what if this hits a child or a woman?" He replied: "There is no harm [in it]. Shoot at them, even if you hit a boy or a woman." (Narrated to me from Mu'āwiya from Abū Ishāq from him.)

Al-Shāfi'ī said: "The Muslims may raid them at night and during the day, and if they hit any women or children, there is no need to pay blood money (*'aql*), to be punished, or to pay expiation." (Narrated to us by al-Rabī' from him.)

And al-Shāfi'ī [further] said: "If there are women, children, and Muslim captives in the polytheists' fortress, there is no harm in assembling the mangonel [so that] it can hit the fortress without hitting the occupied houses. I do not like shooting at these unless Muslims join in a fierce battle near the fortress. Then it is allowed to shoot at its houses and walls. And if there are [enemy] combatants well fortified inside the fortress, you may shoot at the houses and the fortress." Al-Shāfi'ī said: "If they [the disbelievers] use Muslim or non-Muslim young boys as [human] shields while the Muslims are engaged in battle, it is permissible to shoot the enemy combatants but not the Muslims or the young boys; and if they are not engaged in battle, I would prefer for them to stop [the warfare] until they are able to fight them without using [them] as [protective] shields. [The same is true] if they show them children and say: 'If you fight us, we will put them to death,' and [if the Muslims are using] naphtha, fire, and water, [which] is like [using a] mangonel."

Abū Ḥanīfa and his companions said: "There is no harm in [having] night raids and incursions." They said: "There is no harm if Muslims enter the Territory of War (*ard al-ḥarb*) to assemble the mangonel towards the polytheists' fortresses and to shoot at them using mangonels, even if there are among them a woman, child, elder, idiot (*ma'tūh*), blind, crippled, or someone with a permanent disability (*zamin*). There is no harm in shooting polytheists in their fortresses using mangonels even if there are among them those whom we have named."

Abū Ḥanīfa, Abū Yūsuf, and Muḥammad [al- Shaybānī] said: "And also if there are in the hands of polytheists some Muslim captives or some polytheists in the fortresses who have embraced Islam, there is no harm in Muslims shooting at [the enemy] using the mangonel and arrows without deliberately aiming at the Muslims among them; and there is no harm in destroying the fortress and burning them with fire or drowning them with water, even if there are among them those Muslims whom we named, but without deliberately attacking Muslims."

Both [Abū Ḥanīfa and Abū Yūsuf] said: "Also, if there are in the hands of the polytheists some Muslim traders who entered [into the enemy's territory] with a pledge of security (*amān*), it is permissible to shoot at them with the mangonel, to burn their fortresses with fire, and to drown them with water."

Both [further] said: "If the Muslims were to stop the shooting, the burning, and the drowning because of the Muslims among [the enemy], the Muslims could not attack the enemy people since there are always with them some of those whom we have named from among the Muslims, children, women, elderly, and the blind."

Both also said: "If the Muslims besiege one of the polytheists' cities, and the polytheists stand [4] on their city's wall [bringing] with them Muslim children using them as a [protective] shield, the Muslims may shoot at them with the mangonel and arrows, aiming at the polytheists and not the Muslim children. Also, if they face them on land and they have Muslim children with them, using them as a [human] shield, while they are fighting them with swords, we do not see any wrongdoing for Muslims if they strike them with their swords and stab them

with their lances intending to hit the polytheists and not the Muslim children whom they are using as a shield.”

Both [further] said: “Whoever the Muslims hit from among the Muslim children who are with the polytheists, while shooting at the polytheists with the mangonel and arrows, or attacking them with fire until burning them, or inundating them with water, there is no blood money [for them to pay] or expiation. Also, if they hit Muslims who are not in the hands of the enemy or one who has embraced Islam from among the polytheists, whether a woman or a man, or if they hit the polytheists’ children or women, elderly, disabled, blind, injured, or one having a permanent disability, there is no obligation on them, for all those whom they hit, to pay an expiation or blood money, or to be punished (*qawad*). Also, if they join in a fierce battle with swords and stab them with their lances so that they [the Muslims] put to death some Muslims who are with the polytheists or a woman or a child from among the polytheists, they are not to be punished, nor do they pay blood money or an expiation.”

Al-Lu’lu’i said: “Whoever they hit from among Muslim children, or if they hit a Muslim man who has embraced Islam among them, or he is a captive in their hands, or a Muslim woman, the one who caused the killing should pay expiation and he should be obliged to give blood money as long as the slain person was a [Muslim] captive or a merchant. But if [the person put to death] was one who had embraced Islam among them, there would be no obligation to pay blood money and no punishment, [but] he has to pay expiation. Muslims should not, if they know that there are Muslims in the city or the fortress, burn down the city or flood it, and they should not assemble the mangonel towards it.”

And he [further] said: "If there are [in the city] some of the polytheists' children, women, elderly, crippled, blind, injured, or someone having a permanent disability, there is no harm in burning down their city, flooding it, and shooting at them using the mangonel or arrows."

Al-Lu'lu'ī said: "Also, if the polytheists line up opposite the Muslims and with them are some of those Muslims whom we have named, the Muslims should not shoot any of the polytheists using the mangonel or arrows, and they should not stab them with a lance, and they should not strike them with a sword unless they can recognize the Muslims clearly, so that they put to death only disbelievers; and if they do not know, they should not put to death anyone of them unless they can recognize the Muslims among them. If one of them fights against them [the Muslims] by moving toward them with a sword or a lance, then there is no harm if you put him to death whether he is a Muslim or a polytheist."

Abū Thawr said: "If there are Muslim captives in one of the polytheists' fortresses, it is not permissible for the Muslim people to burn them, to shoot at them using mangonels, to obstruct water from reaching them, or to cause any damage which would affect the Muslims among them. They should fight them with what is possible so that its damage does not affect the Muslims. Also, if there are Muslim captives in a fortress, it is not allowed for the people of Islam to deny them provisions (*mīra*). And if the polytheists use Muslim children as a [protective] shield, the Muslims should not shoot at them with arrows or the mangonel unless they are able to shoot at them without hitting any of the Muslim children."

They [Muslim jurists] disagreed on the issue of [those whom Muslims should not put to death] fighting along with the polytheists against Muslims.

Mālik was asked about the enemy's women and boys being on the fortresses throwing stones [upon the Muslims below] and helping [to fight] against Muslims: "Should they be put to death?" He replied: "The Messenger of God prohibited the putting to death of women and boys."⁵⁸ (Narrated to me by Yūnus from Ashhab from him.)

Al-Awzā'ī said: "If the woman and the boy fight [against the Muslims], they should be put to death during the fighting, but if they become captives, they should not be put to death." (Narrated to me by [5] al-'Abbās from his father from him).

Al-Thawrī said: "As for the woman, she should be put to death if she fights [against the Muslims]; and as far as the boys, it is disliked to put them to death." (Narrated to me by 'Alī from Zayd from him.)

Al-Shāfi'ī said: "If women or those who have not reached the age of puberty fight, there is no prohibition from striking [them] with arms, since if there is no prohibition from [putting to death] a Muslim for shedding the blood of a Muslim, then it is more applicable to the polytheists' women and those among them who have not reached the age of puberty, as long as they are not in the state in which their putting to death is forbidden." He also said: "If they are captured, run away, or injured, and they are from among those whom Muslims should not fight, then they should not be put to death, because they have ceased to be in the state in which the shedding of their blood is permissible and [thus] have returned

to the original rule prohibiting their deliberately being [put to death]." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If there are with the polytheists a combatant woman, an insane person, someone [having] a permanent disability, or the elderly, there is no harm, if any of them fights against the Muslims alongside the polytheists, that they be put to death by Muslims." ([Narrated by] al-Lu'lu'i from them.)

[Section 3]

They [Muslim jurists] have concurred that the putting to death of combatant polytheists is permitted whether they advance upon the Muslims or turn away, unless they have given a pledge of security (*aman*), embraced Islam, or have been captured.

[Section 3.1]

They disagreed on [the ruling regarding] others from among their men [i.e., non-combatants].

Mālik was asked about [Christian] monks. He said: "The obligation is to leave these monks alone as I heard and not expatriate them."⁵⁹ (Narrated to me by Yūnus from Ibn Wahb from him.)

Al-Awzā'ī was asked about the blind in the Byzantine land: "Would it be allowable to put him to death?" He replied: "No." Someone asked: "How about the sick young man?" He replied: "Inflict the [punishment] on him." Someone asked: "How about the traveler?" He said: "He should be given with the spoils of war." Someone asked: "What if he [a Muslim] puts him to death?" He replied: "Nothing [wrong has been done]." (Narrated to me by al-'Abbās from his father from him.)

He [the father of al-'Abbās] said: "Al-Awzā'ī said: 'A traveler, a shepherd, a monastery dweller (*ṣawma'a*), or an elderly person, should not be put to death, and if he [a Muslim] does put to death anyone of them, he should repent to God and ask for His forgiveness.'"

Also, Mu'āwīya narrated to me from Abū Ishāq that he said: "I asked al-Awzā'ī: '[What] if a disbeliever (*'ilf*) is found in the Byzantine land in a house that is enclosed on him with a small window [in the wall], from which he can see, and not in a monastery?' He replied: 'This is a monk who has locked himself up.' I [Abū Ishāq] asked: 'Should he not be put to death or captured?' He replied: 'He should not be put to death or captured.' I asked: 'What if they [the Muslims] find a monk who left his monastery and was caught and taken by them, and he says, "I left when you came because I feared you"?' Al-Awzā'ī said: 'No one should harm him.' I [Abū Ishāq] asked: 'May they interrogate him to obtain information about their enemy?' He replied: 'No, because if they interrogate him and he told them, then the enemy [might] interrogate him to know about you; and if he tells them, you will legitimize the shedding of his blood.' I asked: 'What do you think of those who are immune from being put to death, such as an elderly person, monk, or woman, if the Muslims fear that they might tell about them? Is it permissible to put them to death?' He replied: 'No, not until they tell about the Muslims; they should not be put to death based on speculation.' And al-Awzā'ī said: 'If a person is immune from being put to death [by Muslims], and you fear that he might give information [to the enemy], make sure that you feel secure [about him]. This used to be done by the people before us.'"⁶⁰

Al-Thawrī was asked: "What do you think of putting to death the sick young men or the injured?" He replied: "Put [them] to death." Someone asked: "How about the [enemy combatant] who is escaping [from the battlefield]?" He replied: "Put [him] to death." Someone asked: "How about the traveler who travels in the land and does not fight?" He replied: "I do not see anything wrong

with putting him to death.” Someone asked: “How about the monk who is immune from being put to death, shall he be left without paying poll-tax or is he obliged to pay?” He said: “What else?” Someone asked: “If he refuses [to pay], shall he be put to death?” He replied: “Is there anything less [severe] than putting [him] to death?” Someone asked: “Why then do we leave him alone?” He replied: “Because a religious tradition is found regarding his case.” Someone asked: “How about the blind and the crippled?” He replied: “Whoever has the power or the ability to fight should be put to death.” Someone asked: “How about the idiot?” He replied: “I do not like putting him to death.” (Narrated to me by Mu‘āwiya from Abū Ishāq from him).

Al-Shāfi‘ī said: “The putting to death of monks should be avoided, whether they are monastery monks, desert monks [i.e., hermits], or monks who lock themselves up in renunciation [of the world].” And he also said: “We avoid putting him to death, following [the practice of] Abū Bakr al- Ṣiddīq, because, if it is permissible for us to avoid putting to death combatant men after gaining power over them [i.e., capturing them], and the men of some [other] cases, we then will not be sinners by avoiding putting monks to death, but we say this following Abū Bakr and not using analogy (*qiyās*). And if we claim that we avoid putting monks to death because they are in the category of those who do not fight, we should then avoid putting the sick to death when we find them, [6] [along with] the monks, the insane, servants, slaves, and people of vocations who do not fight.” And he said: “I prefer that, if [some] women renunciate, they be left alone as we leave men alone. And if a polytheist’s slaveman or slavewoman renunciates, I would capture him or her, because if the master becomes a Muslim,

I would decide that he could enslave them and deny them the renunciation, since slaves do not possess of themselves what the free do." This is his opinion from his book, which he called *On Fighting Polytheists*.

He [al-Shāfi'ī] said in [his book entitled] *Siyar al-Wāqidi*: "Whoever opposes Islam from among the people of monasteries and others who embrace the religion of the People of the Book, it is inevitable to have either the sword or the poll-tax (*jizya*) [in dealing with them]." Also, he [al-Shāfi'ī] said: "I do not know of any disagreement [among Muslim jurists] regarding monks; either they must embrace Islam, pay the poll-tax, or be put to death." He [al-Shāfi'ī] said: "Farmers, servants, and the elderly should be put to death unless they embrace Islam or pay the poll-tax." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "It is not permissible to put to death a newborn [infant], a woman, an elderly person, the insane, anyone with a permanent disability, or the blind." Also, they said: "As for the saying of [the Caliph] Abū Bakr, 'Do not put to death a monk or a plowman,' [it is applicable] only when their country has been conquered and has come into the hands of Muslims and they [the monks and plowmen] come under the control of Muslims. [In this case] it is not allowed for Muslims to [put them to death], because [monks and plowmen] become booty (*fay'*) for Muslims." (Narrated by al-Lu'lu'ī from them.)

[Section 4]

They [Muslim jurists] agreed unanimously that if the Imām [head of the state] permits a Muslim man to duel with an enemy, the Muslim has the right to duel with the enemy (although al-Ḥasan al-Baṣrī disliked the duel).

[Section 4.1]

They disagreed on having a duel without the permission of the Imām.

Al-Awzā'ī was asked about the disbeliever who approaches [the Muslims] and calls for a duel [with a Muslim warrior]: "May a [Muslim] man face him without the permission of the Imām?" He replied: "No, because the group [of Muslims] who had the duel on the day of Badr did not face the enemy without the permission of the Prophet, [and] he [the Prophet] said: 'Those [Muslims] who are equal to the enemy warriors should face them [in a duel].'"⁶¹

Al-Awzā'ī said: "We do not prefer to have a [Muslim] man be the one to call for the duel." (Narrated to me by Mu'āwiya from Abū Ishāq from him). Abū Ishāq said: "Al-Awzā'ī was asked: 'A [Muslim] man dueled with a disbeliever, and Muslims feared that their companion could be killed.' He replied: 'They should not help him to overcome the disbeliever.' I [Abū Ishāq] asked: 'Even if the Muslim made no stipulation that no other [Muslim] should face the disbeliever?' He replied: 'Even [so], because the duel is like this, but if the Muslims were to separate between them and then leave the disbeliever alone, [it would be permissible].' Someone asked: 'What if the enemy [men] help their

companion?' He replied: 'There is no harm if the Muslims help their companion.'"

Al-Thawrī said: "It is not permissible for a [Muslim] man to duel without the permission of the Imām." (Narrated to me by 'Alī from Zayd from him.)

Al-Shāfi'ī said: "There is no harm in [having] a duel, whether with the permission of the Imām or without. On the day of Badr, 'Ubayda b. al-Hārith, Hamza b. 'Abd al-Muṭṭalib, and 'Alī had a duel [with disbelievers] by the order of the Prophet."

He [al-Shāfi'ī further] said: "If a man from among the polytheists comes out [to Muslims] without calling or being called to the duel, and then a [Muslim] man comes out to him, there is no harm if someone else [from among the Muslims] helps [the Muslim] to overcome [the disbeliever], because [the Muslims] have not given him [a pledge] that only one person will fight with him, and he [the disbeliever] has not asked [the Muslims] to do so. Nothing indicates that he [the disbeliever] wants to fight with only one person. 'Ubayda and 'Utba had a duel: 'Ubayda hit 'Utba and injured [lit. "loosened"] his left shoulder, and 'Utba hit him and cut his leg. Hamza and 'Alī helped 'Ubayda and put 'Utba to death."

He [al-Shāfi'ī] said: "However, if a Muslim calls a polytheist or a polytheist calls a Muslim to have a duel with him, [and] he says to him: 'No one would fight you except me'; or he does not say that to him, but he knows that challenging one person to a duel is like having a pledge of security from the two parties together, I prefer that any [from among the Muslims] would restrain from [hitting] him [the disbeliever]; and if the Muslim turns away from him or he [the

disbeliever] injures him [the Muslim] badly and [comes to him] after their duel to put him to death, [the Muslims] may prevent him from putting him to death if they are able to do so, because their fight [i.e., the duel] is finished. And [the disbeliever] would not have a pledge of security from [the Muslims] unless he makes the condition [before the duel begins] that he will be secure from [the attack of other Muslims] until he returns to his place in the [army] line; then [the Muslims] should not put him to death until he has returned to his safe place. And if the Muslims accept this condition and [then] they fear that he might [put] the Muslim [to death] or if the Muslim was injured, they may save him without putting [the disbeliever] to death. If he [the disbeliever] refuses to let [the Muslims] save their companion and he [stands] in front of [the injured Muslim] to fight them, they should fight him because he has invalidated the pledge of security regarding himself. If he stands between [the injured Muslim] and them and says, 'I ask you [7] for safety,' they should reply: 'Yes, if you let us [save] our companion, and if you do not do so, we will advance to take him. And if you fight us, we will fight you, and you will be the one who has invalidated your pledge of security.'"

He [al-Shāfi'ī] said: "If someone asks: 'How can a [Muslim] man not get help while having a duel with a polytheist who is overpowering [the Muslim]?' it should be said that the help of Hamza and 'Alī to overcome 'Utba [in a fight] was done after there was no ability for 'Ubayda to fight, and there was no safety pledge from them to 'Utba by which they could restrain [from putting him to death]. And if both [men who are dueling] make a condition to have a safety pledge [from the other party], and thereafter the polytheists help their companion,

the Muslims should help their companion and put to death those who helped [in the duel], and they should not put to death [the disbeliever who had the duel] unless he was the one who asked for help to overpower [the Muslim].” (Narrated to us by al-Rabī‘ from him.)

[Section 5]

They [Muslim jurists] agreed unanimously that the Messenger of God made peace with the polytheists of the Quraysh.⁶²

[Section 5.1]

Historians of the life of the Prophet (*ahl al-sīra*) disagreed on the duration of the peace agreement (*muhādana*) that was [issued] between the Messenger of God and the Quraysh. Some of them said it was up to six years; others said [only] up to four years.

[Section 6]

They [Muslim jurists] agreed unanimously that concluding a peace treaty with the polytheists from among the idol-worshippers or the People of the Book (*ahl al-kitāb*) in which the laws of Muslims are not applicable to them forever is invalid if the Muslims have the power to war against them.

[Section 6.1]

They disagreed on what was permissible in concluding a peace treaty with them, the time limit for which peace would be permissible, and the situations where such [a peace agreement] would be allowed.

Al-Awzā'ī said: "If Muslims conclude a peace treaty with the enemy people (*ahl al-ḥarb*) in which they agree to pay Muslims a designated amount [of money] every year so that the Muslims will not enter their country, there is no harm in concluding such a treaty with them. The Messenger of God concluded a peace treaty with the polytheists on the day of Ḥudaybiya without paying to him a tribute (*kharāj*).⁶³ And the Messenger of God said, 'The Byzantines will make with you a secure peace.'⁶⁴ Thus, the Messenger of God did not find fault with [peace agreements]." (Narrated to me by al-'Abbās from his father from him.)

Al-Shāfi'ī said: "I would like for the Imām, if a great misfortune were to happen to the Muslims, and I hope God will not allow this [to happen] to them, to consider concluding a peace treaty with the enemy, whoever they are, and he should conduct a peace [treaty] with [the enemy] only up to a certain time. And the duration [of the peace agreement] should not exceed the duration of [the peace

agreement at] Ḥudaybiya — whatever may be the misfortune. And if the Muslims have power, he should fight the polytheists after [the peace treaty] expires. If the Imām does not have power, there is no harm [for him] to renew [the agreement] for the same duration or less, but he should not exceed [the time limit for the first one] since the Muslims may gain power and their enemy may weaken in less time than that. And if he [the Imām] concludes a peace treaty with them, with a time limit more than [the first], the peace agreement is invalid because the principle of the obligation [in fighting non-Muslims] is to fight polytheists until they believe [in Islam] or pay the poll-tax. God permitted having peace [with the enemy] when he said:

But the treaties with those pagans with whom you have entered into alliance are not dissolved. [Qur'ān 9:4]

And since the Messenger of God did not specify [in a peace agreement with the enemy] any time duration more than that of Ḥudaybiya, the Imām is not permitted to conclude a peace treaty with the enemy except out of consideration for the Muslims' need [of the agreement] and without exceeding [the permissible time limit].

He [al-Shāfi'ī] said: "The Imām may not conclude a peace treaty with polytheist people, without a time limit, since an unlimited peace agreement is not permissible as I described, but [it is permissible] to conclude a peace treaty with them [without specifying a time limit], having the choice in his hand. Whenever he wants to warn them that the truce is invalid, he may, and if he sees that it would benefit the Muslims to invalidate the agreement, he may.⁶⁵ For the Messenger of God concluded a peace treaty with the [people] of Khaybar [who

lived in] one of their fortresses on the condition that they acknowledge what God [ordered them] to acknowledge, to work for the Prophet and for the Muslims, [giving] them half of the fruit [of harvest].”⁶⁶

He [al-Shāfi‘ī] said: “If the Imām wants to have a truce [with the enemy] without specifying a time limit, he may do so with the condition that he has the right to invalidate the truce, and he should [then] escort them to their secure place.”⁶⁷

He [al-Shāfi‘ī further] said: “He [the Imām] should not say: ‘I agree with you [regarding the truce] as God agrees,’ because the Messenger of God received the commands of God by revelation and no one [else] receives a revelation.”

He [al-Shāfi‘ī] said: “If a group from among the polytheists asks Muslims for a truce, the Imām may have a truce with them, having considered the Muslims’ need [for such a truce] and with the hope of their conversion to Islam or their giving of the poll-tax without a [struggle]. Without considering the benefit of a truce for the Muslims, the Imām is not permitted to have a truce with them. Also, even with such consideration, the Imām is not permitted to have a truce with them without [their paying] the poll-tax for more than four months, as God says:

. . . a [declaration] of immunity from Allah and His Messenger.
[Qur’ān 9:1]

to His saying:

That Allah and His Messenger dissolve (treaty) obligations with the pagans. [Qur’ān 9:3]⁶⁸ [8]

(i.e. the verse and what follows it.)

He [al-Shāfi‘ī further] said: “Therefore it is not permissible [for the Imām] to have [the truce] for a certain time due to the revelation of the Qur’ānic verse,

when Muslims have power, for more than four months as I described in God's command concerning them [polytheists] and the action of the Messenger of God."

He [al-Shāfi'ī] said: "The Imām may not conduct a truce [with the enemy] unless he takes into consideration what the benefits will be for Muslims or else invalidates the truce and faces them [in battle]. It is permissible for him, in the case of this consideration, regarding a [disbeliever] whom he hopes might embrace Islam, even if he [disbeliever] does not possess power, to give him a duration of four months if the Imām fears that without doing so, he might join [other] polytheists and attack his [the Imām's] land. The Prophet did that regarding Ṣafwān when he left for Yemen, escaping from Islam; [the Prophet] gave him a duration of four months."⁶⁹

He [al-Shāfi'ī further] said: "And if the Imām assigns a time limit [of more than four months] for the person whom I said should not have more than four months, he [the Imām] must invalidate the agreement with him because of what I described, namely, that it is not permitted for him [to do that]. And he [the Imām] should honor the time [of the truce] given to him up to four months and not more. If its duration is more than four months, the Imām should not say to him: 'I will not honor a four-month [truce],' because the invalidity is indeed in [the truce] which exceeds four months." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If people from the subjects of enemy territory in a fortress, city, army, or [any] people of a country in the Territory of War ask Muslims to have a truce for a certain number of years, providing that the Muslims would not enter their country and that the Muslims' laws would not be applicable to them, and if this [agreement] is good for Muslims

and they [Muslims] fear, if they do not have such an agreement, that the Muslims will not have power over them [in the future], they should conduct the truce according to the agreed conditions; and if they agree with them on such a truce then see that they have power, they should invalidate [the truce] and fight with them.”

[Section 6.2]

They disagreed on [what constitutes a] permissible peace agreement between Muslims and polytheists if the latter are more powerful [than the former].

Al-Awzā'ī was asked about [the case] of a Muslim fortress reached by the enemy, and the Muslims fear that they do not have the ability [to defend themselves]; is it permissible [for Muslims] to sue for peace with them by handing over their weapons, properties, and horses (*kurā'*), providing that they leave the Muslims alone? He replied: “If they [Muslims] do not have the ability to overcome them, then there is no harm in doing so.” (Narrated to me by Mu'āwiya from Abū Ishāq from him.)

Abū Ishāq said: “I asked al-Awzā'ī: ‘What if they [the Muslims] know that they do not have the ability to overpower them, and the enemy asks the Muslims to accept their ruling, and they do not accept anything from the Muslims but this condition?’ He replied: ‘They should not accept their judgment.’” Abū Ishāq said: “I asked: ‘What if the Muslims agree to hand over their weapons and horses, and their Imām concludes a peace treaty in accordance with this [condition]?’ He [al-Awzā'ī] replied: ‘They [the Muslims] should not refuse [to obey] their Imām.’ Also, al-Awzā'ī said: ‘The people should not reject what their

Imām does [regarding peace agreements], and even if they want to fight and the Imām refuses to do so, [they should obey him].”

Abū Ishāq said: “I asked al-Awzā‘ī: ‘Do you think if a rebellion were to break out among the Muslims, and the Imām fears that the enemy might [overcome them] and Muslims might leave their place [in the army], may he conclude a peace treaty with the enemy, giving them [something] every year to defend the Muslims and their dignity?’ He replied: ‘I do not see any harm in doing this if such is the case, or he may write to his regent beside the gate [of the fortress or the city] to give them something to turn them away from [the Muslims].’”

Al- Thawrī was asked about [the case] of a [Muslim] fortress reached by the enemy and the Muslims feared that they would not have the ability to [overpower] them if they did not conclude a peace treaty with them. He replied with the same answer provided by al-Awzā‘ī. (Narrated to me by Mu‘āwiya from Abū Ishāq from him.)

He [Abu Ishaq] said: “I asked Sufyān [al- Thawrī]: ‘What do you think if the enemy wants Muslims to hand over their city to them and leave, and the Muslims accept this [agreement] when they know that they do not have the ability to [overpower] them, and then volunteer [Muslim warriors] say:⁷⁰ “We do not need this peace agreement, but rather we should fight them until God judges between us and them?”’ He replied: ‘If they cannot keep the [enemy from overpowering them], I do not prefer that they should fight, but should accept the peace agreement made by the other [Muslims].’”

Al-Shāfi‘ī said: “There is no good when Muslims give them [the enemy] anything in order to refrain from [fighting Muslims] because fighting, for

Muslims, [9] is a [sacred] testimony. [The religion of] Islam has more honor [in it] than giving a polytheist [anything] to have them leave Muslims alone. Only in one case and another more important than the first: when a group of Muslims engage in war [with the enemy], and they fear that they might be utterly destroyed because of the large number of the enemy [compared with] their small number, or a certain other feature of them, then there is no harm [for Muslims] to give some of their property to rid themselves of the polytheists, because it is [in this case] a type of necessity, and [in the case of] necessities, some [actions] are permissible which are not permissible in other cases. Or if a Muslim is taken captive and he cannot be freed except by [paying] a ransom, there is no harm in giving a ransom [for his release].” (Narrated to us by al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “If a people from the subjects of enemy territory in a fortress, city, or an army demand Muslims to have a truce with them for a certain number of years, with the condition that they [the Muslims] should pay them a tribute, [in this case] the Muslim leader [*wālī*]⁷¹ should take this into account; if the enemy, who demanded the truce from him, has strength and power, and he [the *wālī*] thinks that the Muslims cannot overpower them but rather having a truce with them is good for the Muslims, he may conduct such a truce. And if they make a condition for the Muslim leader to pay [tribute] money every year, the Muslim leader should not give them [the money] and he should fight them. If they demand a truce from him [the *wālī*] without [forcing] him to pay [anything] to them and without any payment from them to him, and he thinks that [the deal] is good for the Muslims, he may

conduct the truce, and, if he sees after having the truce with them that fighting them is better for the Muslims, he may invalidate that truce and fight them.”⁷²

[Both] Abū Ḥanīfa and Abū Yūsuf said: “If Muslims are in one of their cities, and the polytheists are victorious, having besieged the city by assembling mangonels towards them and shooting at them with arrows, and the Muslims fear that they may put them to death or take them [captive], and the enemy refuses to leave unless the Muslims make a truce with them for a certain number of years on the condition that Muslims pay them [something] every year, it is permissible for the Muslims to have a truce with them on the same condition as if they feared for their lives.”

Al-Lu’lu’ī said: “It is not allowed for them [the Muslims] to have a truce with [the enemy] if the condition is that every year Muslims have to pay them a certain amount of money, because this would be the same as a poll-tax and a humiliation. Therefore, Muslims should not conduct such an [agreement], and they should fight them until God judges between them.”⁷³

[Section 7]

They [Muslim jurists] agreed unanimously that if polytheists conclude a peace treaty with Muslims for a limited time in [a way] that is beneficial for Muslims with the condition that they give the Muslims, every year, one hundred of their slaves, this is permissible.

[Section 7.1]

They disagreed on this [kind of agreement] if they give the Muslims [slaves] from among their children.

Al-Awzā'ī said: "If a Muslim army passes by one of the cities in the Territory of War, and afterwards its mayor asks the army commander (*amīr*) not to enter [the city], [on the condition] that he gives the [commander] one hundred [of them as slaves], it does not matter whether they are from their children or from others. Or if he [the army commander] besieges [a city], and the city's mayor comes to the army commander and tells him: 'I will open [the city gates] for you on the condition that you assure safety for me and a group of my people who are with me,' and the commander agrees [but] the [mayor] tricks the people of his kingdom and says: 'I choose for you what I choose for myself [i.e. the pledge of security],' then he opens for them [the Muslims] one of its gates, [in this case] there is no wrongdoing [for the Muslims] to put to death their men and divide their children, women, and properties [among the Muslims]." (Narrated to me by al-'Abbās from his father from him.)

Abū Ḥanīfa and his companions said: "If the enemy asks the Muslims to have a truce with them on the condition that they give [the Muslims] one hundred [slaves] every year from their children and themselves, then the Muslims should not have such a truce, and if they do, they should not take the one hundred persons from themselves and their children; they will be assured safety if the Muslims make a truce with them on this condition, but the Imām of the Muslims should invalidate this truce and then fight them. And if the enemy asks the Muslims to have a truce, by giving [them] one hundred [persons] known by their names [and identity] . . . "74

[Section 8.1]

[On the disagreement regarding the allocation of shares in the booty for youth, servants, slaves, women, and *dhimmīs*]⁷⁵

“ . . . [10] to reach puberty, allocated to him and given a share in the [allocation] for the expedition and in this regard he would be considered as a man.”

All of them [Abū Ḥanīfa and his companions] said: “For the servant, if he is [working for] a Muslim man in the Muslim military [located] in the enemy’s territory and serving him with a wage but does not fight, there is no share for him in the booty whether he is a slave or free man, and for the slave who is serving his master in the Muslim military [located] in the enemy’s territory but does not fight, there is no share and nothing is to be given to him [as a gift]. For the woman, there is no share if she is in the Muslim military medically treating the injured and the sick; nothing from the booty is to be given to her [as a gift].⁷⁶ If a slave fights alongside Muslims, some of the booty is to be given to him [as a gift]; and for [civilians] dispatched with military personnel, there is to be no share in the booty for them if they do not fight alongside the Muslims. If they fight with them until they win the spoils of war, there is to be a share [apportioned to them] similar to the share of military personnel. If a servant fights alongside Muslims until getting the booty, he is to be given a share similar to the share of other Muslims. If Muslims seek assistance from *dhimmīs* so that they fight alongside them until they acquire booty, there is to be no share for the *dhimmīs* with the Muslims, but

something from the booty should be apportioned to them [as a gift]. There is to be no share for a woman whether she fights alongside Muslims or not, but something from the booty is to be apportioned to her [as a gift]. Also there is no share for a young boy who has not reached puberty nor for the insane, because [the latter] is considered as dead.”⁷⁷

Abū Thawr said: “If there is a woman with the Muslims treating the injured and taking care of the sick, there is to be no share of the booty for her, but something should be apportioned to her [as a gift]. The same applies to a *dhimmī*.” He also said: “The slave should be given a share similar to the share of the free man if he [fights].”

[Section 9]

They [the Muslim jurists] agreed unanimously that if a group of Muslims or an army faces an enemy who has the same number of [combatants] as theirs or more, and the Muslims are winning over the polytheists, then it is forbidden for the Muslims to turn away from them [until victory is achieved].

[Section 9.1]

They disagreed on determining who should deserve the punishment of God for turning away from his enemy and in which case it would be permissible to desert [the battlefield].⁷⁸

Mālik was asked about the man who faces ten [enemy combatants] or the like: “Shall he fight them alone or return to his army unit?” He replied: “It is his choice, and if he has no power to fight them [all], then the best thing that I like [regarding his case], is for him to return to his army unit.” Mālik was also asked whether he had heard that [the caliph] ‘Umar b. al-Khaṭṭāb said: “I am the troop for which Muslims [could retreat].”⁷⁹ He replied: “I heard this saying, and I do not like that Muslims retreat to their troop unless it is a case of fearing death or the inability to fight.”

Mālik was asked about the people [Muslim combatants] who face the enemy [in battle] or are guarding an area and are few in number: “Should they fight or turn away — and in so doing bring harm upon their companions?” He replied: “If they have the power to fight them, they should do so or else turn to their companions and inform them.” (Narrated to me by Yūnus from Ibn Wahb from him.)

Al-Shāfi'ī said: "If Muslims raid the [disbelievers] or are invaded, and they are prepared to fight an enemy double the number of them, it is forbidden for them to turn away unless it be a stratagem of war or to retreat to a troop of their own, and if the polytheists are more than double the number [of Muslims], I do not like for them to turn away from the [enemy], but they will not be subject to the wrath of God, according to my judgment, if they turned away from them without being in a stratagem of war or retreating to a troop of their own, because we explained that God's wrath is upon the one who abandons His command, and God's command of jihad is, in fact, for Muslims to struggle against twice their number from the enemy."

Al-Shāfi'ī said: "Muslims commit a sin if an enemy approaches a Muslim [to put him to death] and other Muslims are capable of getting out to face the enemy [in battle] without losing their [fortified] frontier behind them if the enemy is twice their number or less." He [al-Shāfi'ī] said: "If Muslims face the enemy [in battle], and the enemy is greater in number than them, or becomes more powerful than them even without being more in number, using a stratagem or something else, and the Muslims then turn away without it being a stratagem of war or retreating to a troop of their own . . . "80

[Section 10.1]

[On the disagreement regarding what constitutes an invalidation of a peace agreement with *dhimmīs*]⁸¹

“ . . . [11] it is not allowed⁸² for him [the Imām] to invalidate the [peace] agreement with them [the people who pay the poll-tax], using fear and indicating Muslim power as in the case of the people who do not pay the poll-tax, unless they appear to be treacherous, or refuse to pay the poll-tax or [to submit to] the judgment of [Muslims]. If they are separated from each other and a group differs from the treacherous people, and they show fulfillment while others showed refusal, the Imām is allowed to conquer them but not to raid the whole group, and if he approaches them, he should call the people who fulfilled [the payment] to come out. If they do, he should fulfill [the pledge of security given to them] and fight the rest of them; and if they cannot come out, [the Imām] should fight the [whole] group and try not to hit the people who fulfilled [the payment]. If one of them is put to death, then, there is no blood money to pay as compensation for his death or punishment, because he is from the polytheists, and if the Imām is victorious over them, he should leave the people who fulfilled [the payment] alone without taking booty from their property or shedding their blood.”

He [al-Shāfi‘ī] said: “If the Imām makes a truce with a particular people and then the latter attacks other people who have a truce with Muslims or who are *dhimmīs* or Muslims, and they [the attackers] put [them] to death and take their property before declaring the invalidation of the truce, the Imām has the right to

conquer and put them to death and take their [women and children] as captives. And if [the Imām] is victorious, he should force them to be subject to the [Islamic] ruling for the one whom they put to death, injured, and took his property, as he would impose on *dhimmi*s [who commit such a crime] of physical punishment, blood money, and guarantee (*ḍamān*) through property.”⁸³

He [al-Shāfi‘ī] said: “If the poll-tax is taken from a particular people and then some of them commit highway robbery, fight a Muslim man and hit him, commit injustice against a Muslim or a person given a covenant of peace [with Muslims] (*mu‘āhad*), or one of them commits adultery, causes mischief that affects a Muslim or a *mu‘āhad*, or deals in usury, this person is subject to the fixed penalty if the action is punishable [according to Islamic law] by a fixed penalty (*ḥadd*), and is punished severely if the action requires punishment. He should be put to death only if he commits an action that is punishable by death, and this [treatment] is not an abolishment of the covenant [of peace] with him which forbids the shedding of his blood. The abolishment of the covenant occurs only [in the case of] refusing to pay the poll-tax or to accept [Islamic] ruling after the acknowledgment [of such acceptance] and refusing to do so. And if he says, ‘I give the poll-tax, but I do not acknowledge any ruling [concerning what he committed],’ the peace agreement with him should be invalidated by [the Muslim authorities], but he will not be fought for this [while he is] in his place, and [the Muslims] should tell him: ‘You have been given a pledge of security by your payment of the poll-tax and your acknowledgment of it, and we give you time to get out of Islamic territory’; and if he gets out and reaches his secure destination, he should be put to death if [the Muslims] are able to overcome him. And if he is

spying for polytheists on Muslims, trying to show [them] their secrets, he should be punished severely without putting him to death, and his covenant should not be abolished.”

He [al-Shāfi‘ī] said: “If a person having a truce with Muslims for a limited time does some of what I described [above] of this sort of action, his truce should be invalidated, and when he reaches his secure destination he should be fought unless he embraces Islam, or he is from among those from whom the poll-tax is accepted and he gives it [promptly].” (Narrated to us by al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “If one of the kings of the people in the Territory of War become, he and his subjects, *dhimīs* and remain in his land, and he then informs the polytheists about the Muslims’ secrets and harbors the disbelievers’ spies [in his land], this [conduct] does not constitute an invalidation of his covenant, but [the Muslims] should see who commits such actions among them, and if the evidence stands for such [an accusation], he should be subjected to discipline and imprisonment.”

They [Abū Ḥanīfa and his companions] [further] said: “And if he [the king] or one of those with him who became *dhimīs* put to death a Muslim man, this [action] is also not considered to be an invalidation of the covenant [with all of them], but the Muslims should see who did the [killing], and if the evidence stands for such [an accusation], he [the killer] should be put to death.” ([Narrated by] al-Lu’lu’ī from him.)⁸⁴

[Section 11]

They [Muslim jurists] agreed unanimously that if a Muslim army commander (*amīr*) or any free Muslim soldier gives a pledge of security to disbelievers residing in a fortress, then such a pledge should be honored by the whole army.

[Section 11.1]

They disagreed on the permissibility of [giving] a pledge of security from those whom I did not mention [above] and on the action and the wording which constitutes the pledge of security.

Mālik was asked about the gesture of safety: "Is it considered as a pledge of security?" He replied: "Yes, and I think that the [Muslim] army should be informed in advance that they should not put to death anyone to whom they have made a gesture of safety because the gesture, in our opinion, is the same as an utterance." (Narrated to me by Yūnus from Ibn Wahb from him.)

He [Ibn Wahb] said: "Mālik also was asked about [the case of] enemy men descending [from the fortress or city walls] and asking for a pledge of security, saying: 'Safety! Safety!' He said: 'Do you not think that if a man came [to the Muslims] asking [to be transferred to a safe place], it would be obligatory to take him to his safe destination [i.e., insure him safe passage]? As God said:

Then escort him to where he can be secure. [Qur'an 9:6]

Therefore, I think that [the demand for safety] should be accepted from them, and if it is not accepted, he should be escorted to his secure destination."

Al-Awzā'ī said: "[Giving] a pledge of security by a slave, a freeman, and a woman is permissible." (Narrated to me by al-'Abbās from his father from him.)

It has been narrated to me by Mu'āwiya from Abū Ishāq that he said: "I asked al-Awzā'ī: 'What do you think regarding [the case] of a [Muslim] man who enters enemy territory with a pledge of security, so that they would be secure from him, [but] he did not give them a pledge of security?' He replied: 'Yes, if they [12] assured him safety, he would also be assuring them safety.' I [Abū Ishāq] asked: 'And if, in fact, only one man from the group gave [the Muslim] the pledge of security, shall all the Byzantines be assured safety?' He replied: 'Yes.' Someone asked him [al-Awzā'ī]: 'How about the people of Malatia⁸⁵ when the enemy assured them of safety and entered their territory, then the enemy left their territory [but] some of them [the enemy] stayed behind, and then the Muslim army caught up with them?' He replied: 'As for the people of Malatia, they should not fight those [of the enemy] who stayed behind for some need; and as for the [Muslim] army, there is no harm in fighting them [those who stayed behind], because the people of Malatia did not give a pledge of security to the enemy, rather the enemy gave them the pledge while they were in an oppressed state; but if the enemy told the people of Malatia: "Give us an assurance of safety, and we will give you the same, since we do not feel secure because assistance might come to you," and therefore both would give each other a pledge of security, then this [agreement] should be observed by the [Muslim] army.'

"I [Abū Ishāq] asked al-Awzā'ī: 'Is the pledge of security given by the *khawārij*⁸⁶ permissible? He replied: 'Yes.' I asked: 'How about a woman's pledge of security?' He replied: 'There has been disagreement on that [point].'

asked: 'What about a youth (*ghulām*)?' He replied: '[Well,] what about it?' Then he said: 'Do not you think that [the pledge] of a ten-year-old would be valid?'

"I [Abū Ishāq] asked al-Awzā'ī: '[What] if a disbeliever (*ilj*) asks for a pledge of security, and then a man puts him to death before he is given the pledge without knowing [about the disbeliever having security]?' He replied: 'What he did was very evil; he should be admonished by the Imām.' I asked: 'What is his obligation towards God [because of what he did]?' He replied: 'Expiation.' I asked: 'What if he [the disbeliever] is, when he utters the word of security (*al-amān*), in a position of protection [from being put to death by Muslims], or he comes [to the Muslims] at night and demands a pledge of security while he is standing on a mountain, and then a [Muslim] man ascends to him, deceives him, takes him [as captive], and then puts him to death?" He replied: "He did a great evil.' I asked: 'If he asks for a pledge of security while he is in his fortress, should we shoot him?' He replied: 'No, wait until he finishes his utterance, then tell him, 'I do not grant you a pledge of security,' and if he asks that after he has ascended to a terrace and has put down his weapon, you should not shoot at him until he descends from his fortress.' Someone asked him [al-Awzā'ī]: '[What if there is] an underground chamber (*maṭmūra*)⁸⁷ or fortress reached by Muslims and with the enemy is a Muslim war prisoner. They fear [the Muslim army] and ask the Muslim [captive]: 'Will you give us a pledge of security if we set you free?' And he replies: 'Yes, you are secure', and then they come out with the Muslim prisoner.' He replied: 'The army commander may give them a pledge of security if he wants, return them to their underground chamber, or let them leave until they reach their safe destination.'

“Abū Ishāq said: “I asked him [al-Awzā’ī] about [the case of] a disbeliever overcome in fighting by a [Muslim] man, then he asks [the Muslim] to be a war prisoner and asks him for a pledge of security. He replied: ‘If he asks [the Muslim] to be a war captive, I prefer that the Muslim not put him to death and to regard him as a spoil of war (*fay*) unless he fears him.’ Someone asked al-Awzā’ī: [What] if Muslims besiege an underground chamber [belonging to the enemy], and when they have almost conquered it, the enemy gives a Muslim man [with them] a reward on the condition that he grant them a pledge of security, and he takes the reward from them and assures them safety?’ He replied: ‘If he grants them the pledge of security before the Muslims enter the underground chamber, his pledge is valid, and the Imām should decide his punishment and take the reward from him.’”

Al- Thawrī said: “If a woman grants [one of the enemy] a pledge of security, it is valid.” (Narrated to me by ‘Alī from Zayd from him.)

Al-Shāfi’ī said: “The pledge of security [given by] any Muslim of age, is valid whether he is a free man or a slave, a man or a woman.”

He [al-Shāfi’ī] said: “If anyone from those who have not attained puberty or an idiot gives a pledge of security [to an enemy] whether they fought [on the side of the Muslims] or not, their pledge is not valid; also, if a *dhimmi* grants a pledge of security, his pledge is not valid; and if one of those [whose pledge is invalid] grants a pledge of security [to an enemy] and the [enemy] comes to us with this pledge, we should escort them to their safe destination [i.e., guarantee them safe passage], and we should not take their property or their lives, because they did not differentiate between those in our army whose pledge of security is

valid and those who are not; and then we may invalidate the pledge and fight them.”

He [al-Shāfi‘ī] said: “If a Muslim makes a gesture for an enemy which they understand as a pledge of security, and he says: ‘I granted them security through [my] gesture,’ it should be considered as a [valid] pledge, but if he says: ‘I did not intend to grant them security by my gesture,’ then whatever he says would be right; and if he dies before uttering anything, they should not be accepted as secure unless the Muslim governor [*wālī*] renews the pledge of security for them; and the Muslim governor should, if he [the Muslim giving the pledge] dies without explaining [the state of his pledge] or saying before his death: ‘I did not grant them security,’ return them to their secure destination and then invalidate their pledge.” (Narrated to me by al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “If the enemy is fortified in a city, a fortress, or in an army and then a Muslim man grants one of them a pledge of security telling him: ‘You are secure,’ then the secured person goes out to the Muslims, they should not put him to death nor hurt him, but they should invite him to Islam, and if he accepts and embraces Islam, then he has all the rights of Muslims and assumes their obligations; but if he refuses to become a Muslim, they should suggest to him that he may want to be a *dhimmī* and pay the poll-tax. If he accepts he should be left secure, living in the territory of the Muslims, paying the poll-tax [13] with [other] non-Muslim subjects (*ahl al-dhimma*) of the Islamic state; but if he refuses to be a *dhimmī*, he should be returned to his secure destination.”

They [Abū Ḥanīfa and his companions] said: "Also, if a Muslim man grants a pledge of security to people from the enemy [living in] a fortress or a city by saying: 'You are secure,' the Imām should not fight or agitate them until he exposes Islam to them; and if they embrace Islam, they then have the rights of [other] Muslims and the duties observed by them; but if they refuse to embrace Islam, he should suggest to them that they become *dhimmīs* and pay the poll-tax for themselves and the land-tax (*kharāj*) for their land. If they accept this [agreement], they become protected (*dhimma*) and they are secure, paying land and poll-taxes, and the [Islamic] rulings regarding protected non-Muslims should be applied to them; but if they refuse to do so, then they should be returned to their secure place, and the [Muslims] should invalidate the agreement with them."

They [Abū Ḥanīfa and his companions] said: "If one or two Muslim men enter the Territory of War with a pledge of security [from the enemy] or without a pledge, and they arrive at that place subjugated to the [enemy] and they cannot protect themselves, so they grant a pledge of security to a man [from the enemy people], people in a fortress, or people in a city, this pledge should not be accepted as giving security to them from Muslims." They also said: "Also, if five or ten Muslims enter the Territory of War with or without a pledge of security and then they grant a pledge of security to some or all the enemy people, it is not considered to be a valid pledge of security to them from the whole Muslim community, because they granted their pledge without being able to protect themselves from [the enemy]. And if a Muslim detachment, an army, or a group of soldiers enters the Territory of War and some of the Muslims grant a pledge of security to some of the enemy people, whether living in a fortress or a

city, this pledge will provide security for them from [the attack] of the whole Muslim community, because those who granted them the pledge were well fortified."

They [Abū Ḥanīfa and his companions] said: "If a man from the enemy people asks for a pledge of security to enter the Territory of Islam for trade or personal need and a Muslim man grants him security, he will be secure; and if there are his children, slaves, wife, servants, and [other] dependents with him, the safety pledge covers him and all those with him. Also, if he brings with him [to the Territory of Islam] silver, horses, weapons, or money, none of those should be taken from him. And if he leaves with . . . ⁸⁸ someone of unmarriageable kinship [such as] a father, mother, brother, sister, paternal or maternal uncle, and he says: 'They are with me as my dependents,' this should be accepted from him and the pledge of security will cover both [him and the people with him]. And if there are with him his cousins or people who are not his relatives, and he says: 'They are with me as my children,' it should not be accepted from him and there should be no pledge of security for them and his cousins and those with whom he does not have any kinship; if any of them enter the Territory of Islam, they should be considered to be spoils of war for the Muslims."⁸⁹

They [Abū Ḥanīfa and his companions] commented on [the case of] a Muslim man who tells one of the enemy people: "You are secure," or "I grant you a pledge of security," or "No harm [will be done] to you," or says to him in Persian '*matras*,' or "you are secure" [in all these utterances], then the pledge of security is valid. And if he says to him: "Come to us so that we see what would be presented to you," or "Come to us according to the laws of Islam," all this is

considered to be a [valid] pledge of security.” Also, they said: “Giving the pledge of security by one Muslim man to one man from the enemy people, to the people in a fortress or a city for the enemy people is valid; and the pledge given by a woman is valid if she is free, and if she is a slave (*ama*), her pledge is invalid; and the pledge of security given by a merchant man in the Muslim military or with civilians [accompanying them] is valid for those from among the polytheists whom he granted security. The pledge given by a slave is valid if he fights [alongside Muslims], but if he does not fight and only serves his master, and he gives [the enemy] a pledge of security, it should not be accepted. As for the servant, the agent, and the market person, if they are free, their pledge of security is valid whether they fight or not. As for the boy, if he is not mature, his pledge is invalid. As for the girl (*jāriya*), if she is free, then her pledge of security is valid [only] if she menstruates or has completed seventeen years of age,” in the opinion of Abū Ḥanīfa and Zufar; as for the opinion of Abū Yūsuf, Muḥammad al-Shaybānī, and al-Lu’lu’ī, “if she menstruates or has attained fifteen years of age, her pledge is valid.” [Abū Ḥanīfa and his companions said:] “As for the *dhimmi*, if he grants a man from the enemy people a pledge of security, his pledge is invalid whether he fights [alongside Muslims] or not. And if a Muslim man who is blind, crippled, permanently disabled, or [14] sick gives a pledge of security to a man from the enemy people or people living in a fortress or a city, his pledge is valid because it has been related from the Messenger of God that he said:

The less [fortunate] Muslims are obliged [with others] to protect each other.⁹⁰

Abū Thawr said what is similar to al-Shāfi‘ī’s opinion.

[Section 11.2]

They disagreed on the ruling [in the case of] a man from the enemy people given a pledge of security while he is in the fortress or embraces Islam, then it becomes doubtful who has been given the pledge and who has not.

Al-Awzā'ī was asked about [the case of] a fortress reached by Muslims and a man from the enemy appears to them [from above the fortress wall] and embraces Islam, then the Muslims conquer the fortress and every man from [the enemy people] claims that he is the one who embraced Islam, and there are ten of them. He replied: "Every one of them may pay the amount for his price [in the case of taking him as a spoil of war] if he is not identified [as the one who embraced Islam], and a tenth of his price should be left for him." (Narrated to me by Mu'āwiya from Abū Ishāq from him.)

He [Abū Ishāq] said: "Al-Awzā'ī was asked about [the case of] a disbeliever given a pledge of security [by Muslims] on the condition that he lead them to a group of captive women and children and that they secure ten of them for him, and he accepts [the agreement], but when he takes them to the place and shows them the captives or the mountain in which they lived, he dies. He replied: 'All the group of captive women and children should be left alone and not taken [by Muslims].'"

Al-Shāfi'ī said: "If the Imām has a truce with a group of enemy people, and thereafter some of them invalidate the covenant and others do not, and when the Imām fights them, the people who abided by the covenant cannot come out, then the Imām is permitted to fight all of them and to try to avoid [injuring] those

who abided by the agreement, and if he wins a victory, he should leave those who honored the truce [alone], without taking property from them [as a spoil of war] and without shedding their blood.” He [al-Shāfi‘ī] [further] said: “If they mix together and the Imām wins a victory over them, and then all of them allege that they are not infidels, and there is a group of them left, the Imām should refrain from putting to death anyone he is in doubt about, and the Imām should also not take [this person’s] children as captives or his property as a spoil of war, but he should put to death and capture the children of only the one whom he knows did not keep the covenant, and he should take his property as a spoil of war.” (Narrated to us by al-Rabī‘ from him.)

This statement of his [al-Shāfi‘ī’s] indicates that if the one to whom the pledge of security was given is not identified, Muslims should not put to death anyone whose case is doubtful.⁹¹

[Section 11.3]

They disagreed on the ruling regarding [the case] of one of the enemy injured in the Territory of Islam or the Territory of War, and he alleges that he has come to ask for a pledge of security.

Mālik [was asked] about [the case of] a group of enemy people found on the seashore in Muslim territory, and they allege that they are merchants and that the sea has blown them [to the shore], and the Muslims do not know if this is true unless their boats broke or they were thirsty and came for water without the permission of the Muslims. He replied: “I think that the Imām should decide what to do with them, and I do not think that the one who takes them [as a spoil of

war] should pay the one-fifth.”⁹² (Narrated to me by Yūnus from Ibn Wahb from him.)

Yūnus narrated to me from Ashhab that he said: “Mālik was asked about [the case of] a [Muslim] detachment that goes out to Byzantine land, and they find a disbeliever coming towards them, and when they take him [captive], he says: ‘I come to you asking for a pledge of security.’ Then they tell him: ‘You are lying.’” Mālik replied: “Who knows [if] he came asking for security; what I think now is that this [claim] should not be accepted from him.”

Al-Awzā’ī was asked about [the case of] a man [from the enemy people] found in a [Muslim] military unit without a weapon who says, “I have come to you to ask you for a pledge of security.” He [al-Awzā’ī] replied: “His case should be decided by the Imām; if he wills, he may put him to death or keep him alive.” (Narrated to me by al-‘Abbās from his father from him.)

Mu‘āwiya narrated to me from Abū Ishāq that he said: “Someone asked al-Awzā’ī: ‘An enemy boat is hit by a [strong] wind, and no one knows about [its occupants] until they draw near the river of Beirut, and they say: ‘We come to ask for a pledge of security for a certain need.’ Al-Awzā’ī replied: ‘They are secure.’ Someone asked: ‘What if their boat breaks, and they are shipwrecked and say what they said?’ He replied: ‘This is doubtful; to release them is preferable to me.’ Someone asked: ‘What if they do not say this, but come out and ask for a pledge of security?’ He replied: ‘They should be put to death and not given a pledge of security.’

“I [Abū Ishāq] asked: ‘A [Muslim] man finds a disbeliever on the road, and he says: ‘I come as a messenger,’ or ‘I come asking for a pledge of security.’

Al-Awzā'ī replied: 'He is safe unless he points a weapon at [the Muslim].'
 Someone asked him: 'A group of Muslims find infidels sleeping on the side of the road or elsewhere, and when they are taken, they say: "We were coming to you to ask for a pledge of security, [15] but we stepped aside from the road in fear of being put to death," and they have weapons with them?' He replied: 'If they are found not sleeping, and they do not point weapons at [any Muslims] when they find them, [the Muslims] should refrain from [putting them to death], and either they should join Muslims or be returned to their secure destination, and if they are found sleeping and after they wake up, they do not point a weapon at [any Muslims] and do not try to escape from them, they should be granted safety; and if they point a weapon at any Muslims, they should be put to death, and if they try to escape without pointing a weapon at any Muslims, they should be put with the [war] shares (*al-maqsam*).'"

Al-'Abbās narrated to me from his father that he said: "Al-Awzā'ī was asked about [the case of] Muslims raiding, and they acquire a man from the enemy, and he claims he is a protected non-Muslim captured by the enemy: Should the Muslims believe him? He replied: 'The Muslim governor (*wālī*) should wait, and if he proves to be truthful, the *wālī* should return him to his land; but if there is no proof, he should be sold [as a spoil of war].'"

Al-Shāfi'ī said: "If a man from the enemy people is found on the side of the road without a weapon, and he says: 'I come as a messenger delivering [a message or a letter to the Muslim leader],' his words should be accepted as truthful, and he should not be subjected to any harm; but if he is suspected [by the Muslims], they should ask him to swear that [he is telling the truth]; then if he so

swears, he should be left alone. The same ruling [applies] if a person is carrying a weapon and is found alone, without a group with which he would be protected, because in both cases their status resembles what they claim, and whoever claims anything that resembles what he says, and nothing else is known about [his claim], his words should be considered truthful with his oath.”⁹³

Al-Shāfi‘ī said: “If a group of disbelievers enters [Islamic territory] with a visible trade, there should be no harm done to them because their status is the same as all traders who have been given security.” (Narrated to me by al-Rabī‘ from him.)

Both Abū Ḥanīfa and Abū Yūsuf said: “If a man from the enemy people is captured in the Territory of Islam, and he says: ‘I am a messenger for [my] king to the Muslim governor (*wālī*), and I entered without having a pledge of security because I am a messenger,’ and if [the Muslims] cannot verify that he is a messenger, it should not be accepted from him, and he becomes a spoil of war (*ḡay’*) for Muslims. Also, if he carries with him gifts and claims that the Byzantine king sent them with him to the Muslim governor, his [claim] should not be accepted, and he becomes a spoil of war for Muslims.”

Both [Abū Ḥanīfa and Abū Yūsuf] said: “If it is known that the person [mentioned above] is a messenger of the king whether or not he is carrying a gift, he should be secure whether or not he enters [Islamic territory] with a pledge of security, and he should not be harmed; and if the gifts are goods, horses, weapons, and slaves, all of these are legitimate gains for the Muslim governor.” (Narrated by al-Lu’lu’ī from them).

Al-Ḥasan al-Lu'lu'ī said: "If the king's messenger is found in the Territory of Islam, he should be considered a spoil of war for Muslims with all that he carries, whether or not [the Muslims] know he is a messenger, unless he enters with a pledge of security."

All of them [Abū Ḥanīfa and his companions] said: "If a man from the enemy people is taken in the Territory of Islam and says: 'I entered with a pledge of security,' this [claim] should not be accepted, and he should be [treated] as a spoil of war unless two Muslim men testify that a Muslim granted him security.⁹⁴ Also, if the person has been captured, and he claims that he is a Muslim by saying: 'I entered with a pledge of security, then I embraced Islam,' this [claim] should not be accepted from him without proof, and he should be [treated] as a spoil of war for Muslims; also, if he says: 'I embraced Islam in the Territory of War, then I left as a Muslim,' this [claim] should not be accepted, and he should be [treated] as a spoil of war for Muslims unless there is evidence for his claim, and the testimony should not be accepted from one of the enemy (*harbī*) or a protected non-Muslim (*dhimmī*); only two Muslim men may testify that he had embraced Islam in the Territory of War; and if two Muslim men testify [that his claim is true], he should be freed, and no harm should be done to him; and if two Muslims testify that he had embraced Islam in the Territory of Islam before capturing him, he should be (in Abū Ḥanīfa's opinion) a spoil of war, and their testimony is not valid [even] if he is a Muslim." Abū Yūsuf said: "He should be freed, and no harm should be done to him."

[Section 12]

All of them [Muslim jurists] agreed that the one who asks for a pledge of security (*musta'min*) should not be harmed by any [Muslim] if he enters the Territory of Islam with a pledge of security. They [also] agreed unanimously that if the one asking for a pledge of security (*musta'min*) wants to return [to the Territory of War], the Imām should escort him to his secure place.

[Section 12.1]

They disagreed on the place to which the Imām should escort him, and the length of time which the Imām should let him live in the Territory of Islam without [paying] the poll-tax or embracing Islam.

Mālik was asked about enemy [persons] coming into Muslim land with a pledge of security on the condition that they retain the pledge [16] until they return [to enemy territory]; then when they decide to return, and on their way they face some of their land's mountains, and the wind pushes them back [to Muslim land], then they say: "We still retain a pledge from you." He replied: "I think they are right and they should retain the pledge; don't you see that if they have finished their business, and they leave [Muslim territory] and disappear for a while to a nearby place and the wind pushes them back, I think they should retain [their] security [in Muslim territory]. (Narrated to me by Yūnus from Ashhab from him).

Al-Awzā'ī was asked about God's saying:

If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; then escort him to where he can be secure. [Qur'an 9:6]

He replied: "It is forever."⁹⁵ (Narrated to me by Mu'āwiya from Abū Ishāq from him.)

Abū Ishāq said: "I asked al-Awzā'ī: 'Does not the Imām [have the right to] return him [without allowing him to enter Muslim territory]?' He replied: 'It is not permissible for him to do this. [The Imām] should grant him a pledge of security and then escort him to his secure place.' I [Abū Ishāq] asked: 'Where will his secure place be? Don't you see: what if he says: 'My secure place is Constantinople?' Al-Awzā'ī replied: 'If the Imām escorts him to any one of their fortresses or castles, that will be his secure place.' I [Abū Ishāq] said: 'What if a group [of enemy people] enters [Muslim territory] with a pledge of security, and thereafter they go out to return to their homes, and on their way they pass by one of their fortresses or strongholds, and they spent the night there with the intention of moving on to their homes farther away, and thereafter Muslims attack this stronghold or conquer the fortress and the [people given the pledge of security] are with [the enemy]?' He replied: 'They [the Muslims] should capture all of them. They [already] reached their secure place.' I [Abū Ishāq] asked: 'What if a Muslim detachment finds them in their country before they have reached their secure place?' He replied: 'They should not interfere with them.'

"I [Abū Ishāq] asked: 'What if a messenger comes [to the Territory of Islam] to ransom [one of the enemy] or for a certain need?' He replied: 'The Imām has the right to grant him a pledge of security or not to permit him to enter [Muslim territory] by saying: 'Return to your secure place.' I asked: 'What do you think about [the case] if he asks for a pledge of security without putting a condition on his return?' He replied: 'It is not allowed to have this condition when

giving him a pledge of security, but the [Imām] should grant him the pledge, and if he wants he may return, unless he reaches the Territory of Islam.’⁹⁶ I asked: ‘What if the Imām asks him when granting the pledge of security, “What do you want?” and he says, “I want to go with you to your country to pay the poll-tax as do protected non-Muslims,” and he is secured on that [basis] and he accepts?’ He [Al-Awza‘i] replied: ‘He may not come back [to the Territory of War].’⁹⁷ I asked: ‘How about the one who asks for a pledge of security and is given security without any condition, then he is found leaving the military [unit] intending to return [to the Territory of War] without the permission of the Imām?’ He replied: ‘No one should harm him, because he can say: ‘I am done with my purpose and what I came for.’

“I [Abū Ishāq] said: ‘What if a group [of enemy people] comes and asks for a pledge of security [from Muslims] on the condition that they reside in the Territory of Islam without paying the poll-tax, and the Imām grants them security according to this condition?’ He replied: ‘The Imām should say to them: “Either you pay the poll-tax or you return to your secure place [in the enemy territory];” it should be done because it has been done. Muslims get security only through justice; therefore [the Imām] should not let a disbeliever reside in the Territory of Islam without paying the poll-tax.’⁹⁸ I asked: ‘How long may the merchant, the messenger, or the one with certain need, if he enters with a pledge of security, reside [in the Territory of Islam]?’ He replied: ‘According to what the Imām decides after he finishes his business and has sold his goods, and if the Imām finds him delayed, he should order his deportation. And if he claims that he is owed a loan by some people, the Imām should give him a time limit to get his

compensation, and when he reaches the [time limit], he should deport him.' I asked: 'May the [Imām] give him a time limit of a year?' He replied: 'One year is too much.' I asked: 'What if the [Imām] does not set a time limit for his residence, and he [the person granted security] loans [something] for a period of two years and says: "I did not know you would be rushing me, so I sold my goods," don't you think his deportation would be a betrayal?' He replied: 'No, the [Imām] should set conditions for him, when he gives the pledge of security, [in the form of] a time limit for his residency [in Muslim land], but if he says this, one should tell him: 'Go back to your country, and when the time for taking back your loan comes, you may come back and secure it.'"

Someone asked [al-Awzā'ī]: "What if a person comes [to the Territory of Islam] asking for a pledge of security and is willing to pay the poll-tax, but the Imām accuses him of being a spy?" He replied: "The Imām should not deny him a pledge of security if he is willing to pay the poll-tax, and if he fears that [he might be a spy], he may verify his status until he reaches the road,⁹⁹ then he may release him." Someone asked [al-Awzā'ī]: "[What if] a disbeliever comes [to the Territory of Islam], asks for a pledge of security, and is granted security and assigned a time limit of ten days of residence, after which he must leave; thereafter, he sets out and is obstructed by a river, sickness, or something like that, and Muslims capture him after the end of the time limit, [but] before he could reach his secure place?" He replied: "If a certain matter hinders him [from reaching his secure destination] and this excuses him, then he should be released."

Al-Shāfi'ī said: "Whoever from the disbelievers comes [to the Territory of Islam] seeking to embrace Islam, the Imām is obliged to grant him a pledge of

security so that he [the Imām] may read to him the Book of God and invite him to Islam in a way which he hopes that God would convert him to Islam, because of God's saying to his Prophet:

If one amongst the Pagans asks thee for asylum, [17] grant it to him, so that he may hear the Word of Allah." [Qur'an 9:6]

He [al-Shāfi'ī] said: "And for the one whom I said: 'His pledge should be invalidated,'¹⁰⁰ he should be escorted to his secure place; and escorting him to his secure place would be to protect him from [the attack of] Muslims and [their] non-Muslim allies (*mu'ahadin*), as long as he is living in the land of Islam or what is connected with the land of Islam, whether this is near or far away."

He [al-Shāfi'ī] [further] said:

Then escort him to where he can be secure. [Qur'an 9:6]

"God knows better than you do or than the one who accepts [the pledge of security] from you, and those who share your religion and obey you, and not his security from other than you, from your and his enemy who do not provide him security and who do not obey you."¹⁰¹

Al-Shāfi'ī said: "And if the Imām delivers him to the nearest of any polytheists' countries he wants, he is delivering him to his secure place which he [the Imām] is obliged to do, since he took him out unharmed from the people of Islam and those Muslims' allies to whom Islamic rulings are applicable."

He [al-Shāfi'ī] [further] said: "And if he is interrupted in our [land] and is of the people who must pay the poll-tax, he is obliged to leave [the Muslim land], and he should be escorted out unless he resides and pays the poll-tax, and if he offers to pay the poll-tax, it should be accepted from him; and if he is of those

from whom the poll-tax is not taken,¹⁰² he should be obliged to leave or be carried out without keeping him in the Muslim lands and should be escorted to his secure place; and if his clan in which he feels secure is far away, and he wants to be escorted to a farther [place], the Imām is not obliged to do so. And if he has two secure places, the Imām should escort him to the one in which he used to live, and if he used to live in two polytheist lands, the Imām should escort him to any one which he [the Imām] chooses. And if he [disbeliever] asks him [the Imām] for asylum so he may listen to God's words then be escorted him to his secure place along others [with him] from the polytheists, it is an obligation for the Imām to do so."

He [al-Shāfi'ī] [further] said: "Even if he does not leave the place where he asked [the Imām] for security, I prefer that he be granted [asylum]."¹⁰³

He [further] said in his book which he called *Kitāb Siyar al-Wāqidi*: "If a man from the polytheist people comes [to Muslim territory] without a contract [of security] issued by Muslims to him, and he wants to stay with them, this land [i.e., the Territory of Islam] is suitable only for a believer or one who pays the poll-tax; [therefore] if he is from the People of the Book, he should be told: 'If you want to reside, pay the poll-tax, but if you do not, then go back to your secure place,' and if he asks to stay for a while, I prefer that he be granted a [time] for residing of only four months, because God gave the polytheists a [time limit] of four months to go throughout the land; and the most time he is granted should not reach a whole year, because the poll-tax [would be due] in a year."¹⁰⁴ Therefore he should not reside in the Territory of Islam as a resident similar to the one who pays the poll-tax while he does not. If he is from the pagans,¹⁰⁵ the poll-tax should not be

taken from him whether he be an Arab or non-Arab (*a'jamī*), and he should be granted a time of residence similar to that one [of the People of the Book] which is less than a year." (Narrated to us by al-Rabī'.)

[Section 13]

They [Muslim jurists] agreed unanimously that if a disbeliever is given a pledge of security for [other] disbelievers who did not attend with him, and they did not witness him when he asked for the pledge for them, neither the Imām nor Muslims should betray him. They [also] agreed unanimously that if a disbeliever tells the Imām or the army: “I will open for you my fortress or direct you to find a fortress on the condition that I receive something,” then when [the Muslims] open the fortress, the one who accepted this [condition], whether the Imām or the army, should give it to him and carry out what he vouched for, if he asked for the pledge of security before being overcome [by capture].

[Section 13.1]

They disagreed on the ruling regarding his status if he is granted security on the [previous] condition or the like, and the thing [that he wants to get] is not found as he described, or he is granted security after overcoming him.

Someone asked al-Awzā'ī: “[What if] a man finds a disbeliever and captures him, then he grants him security on the condition that he show him the way which he could not find [by himself], and he shows him [the way], then he fears that if he brings him to the Imām he will not be able to fulfill his [promise] to him?” He replied: “He may release him, and if he brings him to the Imām, the Imām should release him and fulfill the given promise of security to him.” (Narrated to me by Mu'āwiya from Abu Ishaq from him.)

[Abū Ishāq said:] “I asked al-Awzā'ī: ‘A disbeliever enters [Muslim territory] with a pledge of security and wants to return, [but] the Imām tells him: “Tell me a secret [or weak point] of the enemy.” He replies: “I will not tell you

[about] Christians.” Does this invalidate his pledge of security?’ He replied: ‘No.’ I [Abū Ishāq] asked: ‘What if [the Imām] makes a condition when he grants him security that he show him the way and tell him what he asks and be truthful to him or there would be no protection for him, and he [the disbeliever] agrees to that [condition]; thereafter they leave going [by his direction] until he takes them suddenly to the enemy or takes them [18] to a different road, or they find that he has cheated them with the information he had given them; is it permissible to shed his blood? And what if the disbeliever says: “I did not want to take you to the enemy but I missed the [right] road, and I told you according to the best of my knowledge”?’ He replied: ‘It is not permissible to shed his blood until it is known that he lied.’ I [Abū Ishāq] asked: ‘What do you think about [the case] if he enters with a pledge of security and the [Imām] tells him: “Either you show me [the road] or there will be no protection for you”?’ He replied: ‘[The Imām] does not have the right to have this condition after giving him a pledge of security, and he should not oblige him with this.’”

He [Abū Ishāq] said: “I wrote to him [al-Awzā‘ī] asking about [the case of] a disbeliever who is captured and he tells the Imām: ‘I’ll guide you to find ten people and you release me.’ He said: ‘Yes.’ When [the Imām] sends [some Muslims] with him, they find only five. He replied: ‘I hold that he should be released because he wanted to fulfill his promise; perhaps something happened to the [disbelievers] after he left them and before he returned.’”

Regarding [the case of] the [Muslim] who finds a disbeliever, captures him, then grants him security providing that he show him the road but he misses, al- Thawrī said: “If [the Muslim] grants him security after capturing him, he is not

secure because he would be a slave.” (Narrated to me by Mu‘āwiya from Abū Ishāq from him).

This is similar to al-Shāfi‘ī’s saying. For al-Rabī‘ narrated to us that he said: “If some messengers from the enemy people come to the Imām, and he responds by giving the [whole] people in their country a pledge of security provided that he take the poll-tax [from them], then some raiding Muslims, while the messengers are still in the [Muslim land], conquer their country and invade their land, [in this case] one needs to see: if the pledge of security was given to them before the conquest and invasion of their country, they should be released and they should be given protection (*dhimma*) because of what they had been given; and if they were given a protection that could be invalidated [by the Muslim side] at any time, they ought to be released and then their contract of protection should be invalidated; and if their captivity and the victory over their country had occurred before what the Imām gave them, their captivity would continue and what the Imām gave would be invalid because he granted a pledge of security to one who had [already] become a slave.”

[Section 13.2]

They disagreed on the ruling regarding one of the enemy who enters the Territory of Islam without a pledge of security and embraces Islam before being captured and is now [already] a Muslim.

Al-Shāfi‘ī said: “If one of the enemy enters the Territory of Islam as a polytheist and then embraces Islam before he is captured, there should be no harm done to him or his property; and if there is a group of enemy people who do this, the same [ruling would be applied.] He [al-Shāfi‘ī] said: “And if they [enemy

persons] fight [Muslims], are captured, and embrace Islam after their capture, they and their property should be [treated as] spoils of war (*fay'*), and their blood should not be shed due to their [belief in] Islam." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa said: "If one of the enemy is taken [captive by Muslims] in the Territory of War and he is a Muslim, and two Muslims testify that he had embraced Islam in the Territory of Islam before he was taken, he should be considered a spoil of war, and their testimony would not be helpful if he was a Muslim." This is also the opinion of Zufar.

Abū Yūsuf said: "If one of the enemy enters the Territory of Islam without a pledge of security, then he embraces Islam before he is captured, he remains a free man and no harm should be done to him." He [Abū Yūsuf] said: "If he is taken [captive] and says: 'I embraced Islam before I was taken,' it should not be accepted from him, and he will be a slave for the one who took him [captive], unless two Muslim witnesses testify for him that he had embraced Islam before he was taken [captive], then he would be a free [man], and no harm should be done to him. Also, [with regard to] the issue of security: If he is granted a pledge of security after entering the Territory of Islam before he is taken [captive], this is valid, and if he is taken [captive] and claims that [he has been granted security], it should not be accepted without evidence to show that he had been given a pledge of security before he was taken [captive]." This is according to the opinion of Abū Yūsuf; and it is [also] the opinion of al-Lu'lu'ī.

[Section 13.3]

They disagreed on the ruling regarding one of the enemy taken [captive] while he is in the Grand Mosque (*al-ḥaram*) [in Mecca]¹⁰⁶ without having a pledge of security given to him.

Al-Shafi'i said: "If a group of enemy people seeks refuge in the Grand Mosque [in Mecca] in order to protect themselves in it, they should be taken [captive] as they would be taken in a place other than the Grand Mosque, and the ruling, regarding them, of putting to death and other [types of punishment] remains the same as if they were in a place other than the Grand Mosque."

He [al-Shāfi'ī] [also] said: "The meaning of the Prophet's saying regarding Mecca: 'It is forbidden by God's sacred ruling; it was not permissible for anyone before me and it is not permissible for anyone after me'¹⁰⁷ is God knows best that it is not permissible to start a war in Mecca and [for it] to be like other [cities]." He [al-Shāfi'ī] said: "When ' Āsim b. Thābit and Khubayb were put to death [by the pagans of Mecca], the Prophet ordered the putting to death [19] of Abū Sufyān in his house in Mecca if it was possible at a time when it was prohibited to have war [in Mecca].¹⁰⁸ This [tradition] shows that [the sacredness of Mecca] does not prohibit anyone from anything he is obligated to do but it does prohibit its being [attacked] in war like other [cities]." (Narrated to us by al-Rabī'.)

Abū Ḥanīfa and his companions said: "If a man from the polytheists goes out to the Territory of Islam without having a pledge of security and enters the Grand Mosque in Mecca, Muslims should neither put him to death nor take him [captive], nor should they provide him shelter, food, or drink, nor should they speak to him, and he should be put under careful watch; and if he goes out of the Grand Mosque, he should be considered to be a spoil of war for the Muslims," in

the opinions of Abū Ḥanīfa and Zufar. Abū Yūsuf and al-Lu'lu'ī said: "He is a spoil of war for the particular person who took him [captive] and not for [other] Muslims."

[Abū Ḥanīfa and his companions said]: "If he embraces Islam while he is in the Grand Mosque or after leaving it before he is taken [captive], it is the same [regardless], and he should be treated as a spoil of war for the Muslims, and the Imām should sell him and divide his price with [the general] spoils of war," in the opinion of Abū Ḥanīfa.

Abū Yūsuf and al-Lu'lu'ī said: "If he embraces Islam in the Grand Mosque or after leaving the Grand Mosque before he is taken [captive], he remains a free man and no harm should be done to him."

Abū Ḥanīfa and Zufar said: "If a Muslim man grants him a pledge of security while he is in the Grand Mosque or after leaving it before he is taken [captive] or after, it is the same and it is not considered a [valid] pledge of security, and he becomes a spoil of war for Muslims."

Abū Yūsuf and al-Lu'lu'ī said: "If a Muslim man grants him security in the Grand Mosque or after he leaves it before taking him [captive], it is considered to be a [valid] pledge of security for him, and he should be returned to his secure place; and if [the Muslim] grants him security after taking him [captive], his pledge is invalid and he should be considered a spoil of war for the one who took him. And if he is taken captive in the Grand Mosque and has been expelled from it, the one who did so has misbehaved, and he [the captive] should be considered a spoil of war for Muslims [in general]," in the opinions of Abū Ḥanīfa and Zufar; and in the opinions of Abū Yūsuf and al-Lu'lu'ī, he should be

considered to be a spoil of war for the one who took him [captive] and expelled him [from the Mosque].

All of them [Abū Ḥanīfa and his companions] said: "If one Muslim takes him [captive] in the Grand Mosque without expelling him from it, he [the Muslim] should release him in the Mosque and wait until he leaves the Mosque, then he may be taken. . ." ¹⁰⁹

[Section 13.4]

[On the disagreement regarding prisoners of war (*asrā*) who claim they have been given a pledge of security by Muslims] ¹¹⁰

Al-Awzā'ī was asked about prisoners of war (*asrā*), if they claim that they have been given a pledge of security and a Muslim man says: "I granted them security." He replied: "His pledge for them is valid." (Narrated to me by al-'Abbās from his father from him.)

Also, Mu'āwiya narrated to me from Abū Ishāq that he said: "Someone asked al-Awzā'ī: 'What if a [Muslim] man comes with an infidel to the Imām and says: "I granted him security?"' He replied: 'He should be believed.' [Someone asked]: 'What if the disbeliever says: "[The Muslim] granted me security" or says: "He found me on the road seeking you," and the Muslim says: "I did not grant him security, [but] I found him on another road?"' He [al-Awzā'ī] replied: 'This is doubtful; he should be considered to be a spoil of war.'" He [Abū Ishāq] said: "I asked him: 'Shall the Imām make him swear?' He replied: 'If he is from among truthful people, [the Imām] should not make him swear, but if he is from suspicious people, he should make him swear.'" "

Al-Shāfi'ī said: "If Muslims gain prisoners of war [captives], men, women and youths, or achieve victory over one of the fortresses, and then a Muslim man or woman says: 'We granted them security,' it should not be accepted from them unless it is known that that [happened] before they were captured or overcome, and if the Imām knows about [this agreement], they should not be captured or taken as spoils of war but rather left alone; and if two trustworthy Muslim men testify that they had a security pledge before their capture, it should be accepted and they should be left alone; and if anyone claims he had pledged them security, his words should not be accepted unless he can bring two trustworthy Muslim witnesses to testify that he granted them security."

He [al-Shāfi'ī] [further] said: "And their status before Muslims own them is different from their status after they own them. The word of a man or a woman saying they granted security to an enemy person after [the latter] has been captured by Muslims should not be accepted, because it is testimony to get [the captive] out of the hands of those who own him, and the testimony of a man on his own action should not be accepted."

He [al-Shāfi'ī] said: "And if we invalidate the testimony of [the Muslim] who granted them security, his right with the [enemy] is invalid, [and] he may not own them." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If two Muslim men testify for a man from the enemy people that a Muslim man had granted him security before he entered the Territory of Islam, then he entered the Territory of Islam and embraced Islam or did not until he was taken [captive], their testimony for him is valid, and he remains a free man, with no harm done to him."

[20] They [Abū Ḥanīfa and his companions] said: "And if one or two Muslims testify that they had granted him security before he entered the Territory of Islam, their testimony is invalid because they have testified on their own actions."

They [Abū Ḥanīfa and his companions] also said: "Also, if there are three or more, and one of them testifies that he granted him security, his testimony should not be accepted; and if two of them testify that the rest granted him security, their testimony is valid and [the enemy person] is secure. And if they testify and each one of them says: 'I granted him security, myself and my companions,' their testimony is invalid," in the opinions of Abū Ḥanīfa and Abū Yūsuf. Al-Lu'lu'ī said: "If there are three and each one of them testifies that he himself granted him security in addition to his two companions, their testimony is valid and he would be secure."

Abū Thawr said, in this matter, something similar to al-Shāfi'ī.

[Section 14]

All of them [Muslim jurists] agreed unanimously that if some slaves of enemy people join the Muslims, coming as Muslims against the will of their masters, they should be considered free, and their masters have no authority over them as long as they come as Muslims or ask for a pledge of security. They also agreed that if a man from the enemy people embraces Islam and his slaves also embrace Islam with him or after him, they should still be considered his slaves, and that if they go out to the Territory of Islam against the will of their master, then their master goes after them, and the Imām knows for certain that their master has embraced Islam either with or before them, they are to be returned to their master. Also, if [the slave] embraces Islam before his master, and then he does not come out [to the Territory of Islam] against the will of his master until his master comes out with him to the Territory of Islam having a pledge of security, then he should still be his slave.

But al-Awzā'ī said: "If a slave from the enemy's slaves embraces Islam, and Muslims then catch him in their country before he can come to us, he should be [considered] free." (Narrated to me by Mu'āwiya from Abū Ishāq from him.)¹¹¹

[Section 14.1]

They disagreed on his status if his master has directed him [to come to the Territory of Islam], and he comes asking for a pledge of security for the need of his master, then he embraces Islam and resides in the Territory of Islam.

Al-Awzā'ī was asked about a man from the enemy who has sent a slave for him [to the Territory of Islam], having also sent along with him money, and

tells him: "Buy my [enslaved] wife and children." Then the slave takes a pledge of security from the Imām, and when he delays reaching his master, the master takes a pledge of security from Muslims and says [to the Muslim authority]: "This is my slave, I sent him and ordered him to get a pledge of security and to buy my [enslaved] wife and children, and when his return was delayed, I came for him." The slave acknowledges that he is [owned] by him and that he sent him. [The question is:] "May [the master] get the slave and the money? And what if the slave has embraced Islam while [at the same time] he acknowledges his slavery to the master and his [ownership] of the money, and what if he did buy his [enslaved] wife?" Al-Awzā'ī replied: "If the slave enters with a pledge of security whether he embraces Islam nor not, he himself is secure along with everything he brings with him and what he brings along with his master's wife and children; his master should not be allowed to transgress over him, because he entered with a pledge of security and therefore he is secure." (Narrated to me by al-'Abbās from his father from him.)

According to the opinion of al-Shāfi'ī, the slave who has been given a pledge of security should be returned to his master; also, if he embraces Islam [he should be returned], but he should be sold back to his master if [the master] comes out of [the Territory of War] as a disbeliever. Al-Rabī' narrated to us that [al-Shāfi'ī] [also] said: "He is not freed by embracing Islam except in one case, [which is] if he comes out of the Territory of War as a Muslim."

He [al-Shāfi'ī] [further] said: "A Muslim slave came to the Prophet, then his master came after him. The Prophet bought him from [his master] with two slaves, and so if this [being a Muslim] would free him, [the Prophet] would not

buy a free man then free him afterward, but he [the slave] had embraced Islam without going out from a land which was in a state of war [with the Muslim state].”

Mu‘āwiyā narrated to me from Abū Ishāq that he said: “I asked al-Awzā‘ī: ‘What do you think if the slave, when he asks for a pledge of security, says: ‘My master sent me with money to ransom his daughter,’ and he is granted security on this [agreement]?’ He replied: ‘The security should be [extended to] the daughter and the money, [and] she should be returned to her father.’”

Abū Ḥanīfa and his companions said: “If some slaves of a man from the enemy people enter the Territory of Islam trading for him or with his permission or with his letter [to the Muslim authority] and then embrace Islam, their status [as slaves] remains the same, and they should not be allowed to return to the Territory of War [but] should be sold, and their price should be sent to their master.”

[Section 14.2]

They disagreed on the ruling regarding [the status of] one of the enemy whose slave embraces Islam in [21] the Territory of War, then his master sells him before becoming a Muslim.

According to the opinion of al-Shāfi‘ī, his sale is valid and he is owned by the buyer, and if a Muslim buys him [from his master], and thereafter [Muslims] win a victory over the [enemy] territory, he [the slave] is owned by his master who bought him; and if he is purchased by one of the enemy, then overcome by [Muslims], he is booty for Muslims. He should not be freed nor should he be put to death, since, being a Muslim, his blood may not be shed.

Abū Ḥanīfa said: "If some slaves belonging to one of the enemy embrace Islam in the Territory of War and their master does not, then [the master] sells them to a Muslim, a *dhimmī*, or one of the enemy, they become free. Also, if he donates them or gives them in charity to a Muslim, one of the enemy, or a *dhimmī*, they become free; and if he [the master] embraces Islam before selling, donating, or giving in charity any one of them, they remain his slaves, and he may do with them what he wants."

Abū Yūsuf said: "[The master] may sell them before he becomes a Muslim, but after their conversion to Islam, to a Muslim if he wants. If he wants, he may sell them to a *dhimmī* or one of the enemy, and they do not become free until they come out to us against the will of their master; then, they become free."

[Section 14.3]

They disagreed on the ruling [regarding one of the enemy] who comes asking for a pledge of security and brings with him a Muslim slave, or [if he] brings a Muslim slave in the Territory of Islam then decides to return, taking [with him] the Muslim slave to the Territory of War.

Al-Awzā'ī was asked about [the case of] a man from the enemy people who goes out with a pledge of security to the Territory of Islam and a slave of his who goes out with him [then] embraces Islam: "Should the [one of the enemy] be allowed to take [the Muslim slave] with him back to the Territory of War?" He replied: "If one interferes with him and takes [his slave], we are not acknowledging his pledge of security; since he has entered [the Territory of Islam] with a pledge of security, he should be secure with his blood and property, but Muslims should buy [the Muslim slave] from him even if they pay double the

price. In fact, the agreement between the Messenger of God and the polytheists in Mecca was that the one who joined the Messenger of God was returned [by Muslims] to the polytheists, and the one, from the companions [of the Prophet] who joined the disbelievers would not be returned to him, and Abū Gundul b. Suhayl b. 'Amr escaped with his shackles to the Messenger of God [coming as] a Muslim, and the Messenger of God returned him to them. Also, the Messenger of God returned Abū Baṣīr from Medina along with two messengers sent by the polytheists to the Messenger of God who came to get him back, and so the best one to be followed in terms of fulfilling his promise is the Messenger of God."¹² (Narrated to me by al-'Abbās from his father from him.)

Al-Shāfi'ī said: "If one of the enemy enters the Territory of Islam with a pledge of security and buys a Muslim slave, only one of two opinions are permissible [to follow in this case]: The purchase may be revoked and he will still be owned by his first master, or the purchase remains valid but he is obliged to sell him. If no one can get to him before he escapes with [the Muslim slave] to the Territory of War, then [the master] embraces Islam, the slave belongs to him; if he sells him or donates him, his sale or donation is valid, and he [the slave] does not become free by entering the Territory of War with him."

He [al-Shāfi'ī] said: "And if one of the enemy enters the Territory of Islam with a pledge of security and with him are a slave man [and] a slave woman, and both of them or one of them embraces Islam, I would force him to sell them or the Muslim among them, and I would pay him their price, since there is no pledge of security which is given to him that allows him to own a Muslim, and the pledge of security [given] to the allied *dhimmī* is more than his pledge. So I would force

him to sell those who embrace Islam from among his slaves.” (Narrated to us by al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “If some slaves belonging to a man from the enemy people embrace Islam, then he comes out with them having a pledge of security, they are [considered] to be his slaves, but he is not allowed to return them to the Territory of War, and he should be forced to sell them; and if he returns and leaves them in the Territory of Islam trading for him, they should not be allowed to return to the Territory of War because they are Muslims, but they should be sold and their price should be sent to him.”

They [Abū Ḥanīfa and his companions] said: “If a group of enemy people enters the Territory of Islam with a pledge of security for trading, then one of them buys a slave from a Muslim or a *dhimmi* and leaves with him to the Territory of War, he is considered to be a free man; and if he frees him before taking him out of [the Territory of Islam], his manumission is valid, and if he does not free him, he should be forced to sell him, and he should not be able to take him out.” They [Abū Ḥanīfa and his companions] also said: “If some slaves for a man from the enemy people embrace Islam and go out [to the Territory of Islam] in order to trade for him or to trade by his permission or by his message, they are still considered to be his slaves, but they should be prevented from returning to the Territory of War and should be sold and their price sent to him.”

[Section 15]

All of them [Muslim jurists] agreed unanimously that if one of the enemy enters the land of Islam with a pledge of security and then embraces Islam, [22] and in his hand are hard money, slaves, and other types of property, then Muslims attack his country and are victorious, all that is in the hands of the one of the enemy who asks for the pledge and embraces Islam remain his, and [no one] else has a right to it.

[Section 15.1]

They disagreed on [the status of] his property in the enemy land.

Al-Awzā'ī was asked about [the case of] a man from the enemy people who goes out asking [Muslims] for a pledge of security, and when he enters the Territory of Islam, he becomes a Muslim; and thereafter, Muslims are victorious in the territory in which his wife and children reside. He replied: "His wife and children should be left for him as the Messenger of God did to those Muslims with him when he was victorious over the polytheists in Mecca [including] their wives and children."¹¹³ (Narrated to me by al-'Abbās from his father from him.)

He [the father of al-'Abbās] said: "Al-Awzā'ī said: 'Whoever embraces Islam in the Territory of War, then he goes out to the Territory of Islam, he is like the one who emigrates to God,¹¹⁴ escaping with his faith to Islam; therefore, his status regarding his property when the Muslims are victorious over his land is the same as the status of his brothers, the emigrants when the Messenger of God was victorious over the polytheists in Mecca. He did not take [their] money, lands or houses.' He [al-Awzā'ī] said: 'Also, if he has some deposits in the Territory of

War in the hands of polytheists from the enemy people, they are considered to be his if Muslims are victorious over his land.”

Al-Shāfi‘ī said: “If one of the enemy enters the Territory of Islam with a pledge of security and he leaves in the Territory of War deposits in the hands of a Muslim, one of the enemy, or an agent for him, then he embraces Islam, there should be no harm done to him, his property, or his small children, whether his property is real estate or other things; the same is true if he embraces Islam in the Territory of War and then goes out to the Territory of Islam; there should be no harm done to the property of a Muslim wherever he is, and it is forbidden that a Muslim’s property be considered booty in any case. As for his mature children and his wife, their status is the ruling regarding themselves: they will be subjected to what the enemy people are subjected to, [i.e.] putting to death and capture.”

He [al-Shāfi‘ī] [further] said: “And if his wife is captured while she is pregnant by him, then there is no enslavement for that [one] in her womb, because when he is born, he is a Muslim [depending] on whether his father has embraced Islam, and enslavement (*al-siba*) is not applicable to him.” (Narrated to us by al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “If a man from the enemy people goes out to the Territory of Islam with a pledge of security and then embraces Islam, and thereafter Muslims conquer the territory in which are his family, property, children, and his wife, all of them are [considered to be] spoils of war (*fay*) for Muslims; his property, wife, and small and mature children are [all] be considered to be spoils of war for Muslims, and whatever of his property that is in his family or on deposit with a Muslim, a *dhimmi*, or one of the enemy in the

Territory of War, all these are spoils of war for Muslims, along with his house and land.”

They [Abū Ḥanīfa and his companions] said: “And if one of the enemy embraces Islam in the Territory of War and goes out to Muslims, then the Muslims are victorious over that territory, the one of the enemy who has embraced Islam [as well as] his small children are [considered] to be free Muslims and no harm should be done to them, and his mature children and wife should be spoils of war for Muslims whether his wife is pregnant or not; and whatever property he has as a deposit with a Muslim or a *dhimmī* in the Territory of War belongs to him, and whatever is in his house belongs to him; but whatever [he has] in the hands of one of the enemy are spoils of war for Muslims. As for his house and lands, they [too] are spoils of war for Muslims.”¹¹⁵

They [Abū Ḥanīfa and his companions] said: “[If] a Muslim merchant enters the Territory of War with a pledge of security, and he brings and sells [property] and gets money, slaves, and animals, and he buys lands and houses, and thereafter Muslims become victorious over that territory, all his money, slaves, and goods remain his and no one may take them, and whatever from his goods or money is deposited with a Muslim, a *dhimmī*, or one of the enemy, it should be given back to him. As for his lands and houses, they are spoils of war for Muslims, because houses and lands may not be transferred.”

[Section 16]

They [Muslim jurists] agreed unanimously that if one of the enemy enters the Territory of Islam with a pledge of security and buys animals or clothes, he may take these with him to the Territory of War and the Imām may not prevent him from doing this.¹¹⁶

[Section 16.1]

They disagreed on other than this [23] [i.e., what is not permissible for him to carry into the Territory of War].

It was said to al-Awzā'ī: "A disbeliever comes to us with a pledge of security; shall he be allowed to leave us with weapons or horses (*kurā*)?" He replied: "No." Someone asked him: "What if he [the disbeliever] brings with him [to the Territory of Islam] a weapon or a horse; shall he be allowed to take it back with him?" He replied: "Yes, if he has been given a pledge of security on this condition." (Narrated to me by Mu'āwiya from Abū Ishāq from him).

Abū Ishāq said: "I asked al-Awzā'ī: 'One of the enemy asking for a pledge of security (*musta'min*) enters [the Territory of Islam] with a [female] horse and then takes a [male] horse from a Muslim man [to mate with his female horse], and she bears a foal; shall he be allowed to take the foal with him?' He replied: 'Yes, because the son relates [to the mother], but the Imām should admonish him for what he did.'"

Al-Shāfi'ī said: "There should be no prohibition on the carrying of food, clothes, and slaves, and there is no harm if a Muslim carries all of that and sells it

in the Territory of War, because the Prophet sold the captives of Banī Qurayẓa to the polytheists.”¹¹⁷

He [al-Shāfi‘ī] [further] said: “As for the horses and weaponry, I do not know anyone who allows their sale without permitting their purchase.” (Narrated to us by al-Rabī‘ from him.)

Abū Ḥanīfa said: “If one of the enemy enters the Territory of Islam with a pledge of security and loans some Muslims [money], then he gets money, goods, slaves and horses, he should not be allowed to enter the Territory of War with a weapon he has purchased in the Territory of Islam, and he should not enter [the Territory of War] with any of the horses or slaves if he bought them in the Territory of Islam, and he should be forced to sell them and not be [allowed] to leave with them. And if he leaves [the Territory of War] with a weapon and exchanges it [with Muslims] for one similar or less [effective], he should be allowed to go out with it, [but] if he exchanges it with a better [weapon], he should not be allowed to leave with it. And if he sells the weapon with which he left [from the Territory of War] for money (*darāhim*) or any type of goods other than a weapon, he should not be allowed to buy any weapon and take it to the Territory of War, and he should not buy the [same] weapon that he sold and be allowed to go to the Territory of War, and he should be forced to sell it if he has re-bought it. Also, [the same ruling applies] to horses¹¹⁸ and jades: if he leaves [the Territory of War] with them, he is permitted to sell them, but he is not permitted to buy [new ones] to replace them; and if he exchanges them with similar or less [effective ones], he should be allowed to go with them to the Territory of War, and if he exchanges them for better ones, he should not be

allowed to go out with them.” This is also the opinion of Abū Yūsuf, Zufar, and al-Lu’lu’ī.

Abū Thawr gave an opinion similar to that of al-Shāfi’ī.

[Section 16.2]

They disagreed on the ruling [regarding] the property of the one of the enemy who asks for a pledge of security and then enters the Territory of War and leaves deposits for himself in the Territory of Islam and then is put to death in his [home] territory.

Al-Awzā’ī was asked about the one who asks for a pledge of security if he returns to the Territory of War while having made a loan in the Territory of Islam and while retaining deposits of slaves and other [things], and he leaves¹¹⁹ some of his slaves in the Territory of War and others in the Territory of Islam; [subsequently] he is put to death, and then the Muslims are victorious over the territory in which he used to lived. He replied: “His loan in the Territory of Islam, his deposits, and all his money should be put in the Muslims’ public treasury office (*bayt al-māl*), because if he were alive and then went back to the Territory of Islam having a pledge of security, he would have the right to have his money and deposits.” (Narrated to me by al-‘Abbās from his father from him.)

He [the father of] al-‘Abbās said: “Al-Awzā’ī was asked about a man from the enemy who sends his slave to trade in the Muslims’ land, and the slave comes having a pledge of security and embraces Islam: ‘How can the alms¹²⁰ be taken from him when he states that the money is for his master? And how [should the case be handled] if the slave does not embrace Islam and then he dies? Should the money be sent to his master or not? And what if the master has been captured —

should the money be given to him or not?' He replied: 'If he [the slave] enters with a pledge of security, he should not be interfered with regarding the money he takes out with him, and his alms, after he embraces Islam, are one *dīnār*,¹²¹ taken from each forty *dīnārs*, and he should be given whatever is less [than the forty *dīnārs*] until it reaches twenty *dīnārs*, and if the money decreases to less than that, it should be left [without taking the obligatory alms];¹²² and if the slave dies before embracing Islam, the money [of his master] should be [regarded] as a trust (*waqf*), and if his master or his messenger comes and enters [the Territory of Islam] having a pledge of security, [the money] should be given to him; and if his master has been captured and either put to death or kept alive, his money should be added to the spoils of that army [which captured him].'"

Al-Shāfi'ī said: "If one of the enemy enters the Territory of Islam [24] having a pledge of security, and he deposits [property] and sells and leaves property, and thereafter he returns to the Territory of War and is put to death, his loan and deposits and all the property he has should be taken as booty, [and] there is no difference between the loan and the deposit." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If one of the enemy goes out to us having a pledge of security for trading, and he gains money and goods and deposits some of it with a Muslim man and loans the other part, then he returns to the Territory of War and is put to death or captured, whatever he deposited is a spoil of war (*fay'*) for Muslims. Also, [the same ruling applies] for the forcibly taken property (*ghaṣb*) that is still unconsumed: it is a spoil of war for Muslims; as for the loans and the used money which have been forcibly taken, they should

be abolished for the one who owes them and they should not be considered to be spoils of war. Also, if he has loaned a Muslim money, it is canceled if he is put to death or captured."

[Section 17]

They [Muslim jurists] unanimously agreed that if a person given a pledge of security dies in the Territory of Islam and leaves money which he brought with him when he came or which he gained from trade in the Territory of Islam, and he leaves heirs in the Territory of War, the money should be returned to his heirs.

Nevertheless, al-Awzā'ī said: "It should be returned to his heirs if he had come to the Territory of Islam and asked for a pledge of security provided that he would return [to the Territory of War]." He [al-Awzā'ī] said: "If he had asked for the pledge of security without mentioning a return and was granted security and then he died, his inheritance would be for Muslims; and if his brother comes and says: 'Indeed he asked you for a pledge of security and he wanted to return,' he [the brother] should not be believed." This is the tradition of [Abū Ishāq] al-Fazārī from him, [as] narrated to me by Mu'āwiya from him. As for al-'Abbās b. al-Walīd, he narrated to us from his father from him [al-Awzā'ī] a similar opinion to the other [jurists] that I have mentioned.

[Section 17.1]

They [Muslim jurists] disagreed on the ruling regarding the heirs if the Muslims' Imām does not know them, and they come with a letter from the enemy's king and provide evidence from the disbelievers' people, following their consensus [Muslim jurists'] that if they provide two trustworthy Muslims who testify for them that they are the heirs, the money should be given to them.

Al-Awzā'ī said: "If they [the heirs] are more entitled to have his inheritance than Muslims, his heirs should be given his inheritance based on their king's letter proving that they are his heirs and [also based on] the testimony of each one of them to the others." (Narrated to me by al-'Abbās from his father from him.)

Al-Shāfi'ī said: "If one of the enemy comes to the Territory of Islam and has a pledge of security, then he dies, the pledge of security [includes] both himself and his property, and it is not permissible to take anything from his property, and the [Muslim] ruler should return it to his heirs wherever they are; and if his heirs were not known, the testimony of anyone should not be accepted except that of Muslims, and it is not permissible, whether in this case or another, to [accept] the testimony of someone who has not embraced Islam." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa said: "If he [the one of the enemy] dies and leaves money, what he leaves should be sent to his heirs if they are known or to an agent for them [if there is] evidence that [shows] he is an agent; and if he comes with evidence of the number of heirs [whether they are] from Muslims, *dhimmīs* or enemy people, I would accept that and I would not apply analogy (*qiyās*) [in this case], and I would, therefore, validate the testimony of the enemy people.¹²³ And if the agent comes with a letter [from] their king, I would not accept that, and if he comes with evidence [proving the authenticity of the letter], I would not accept it." This is also the opinion of his companions.

All of them [Abū Ḥanīfa and his companions] said: "If a man from the enemy people comes to us with a pledge of security and dies in the Territory of

Islam and leaves property, and he has a son from the *dhimmī* people, a Muslim son, a son with him from the enemy people, and a son whom he left in the Territory of War, then his son who went out with him asking for a pledge of security and the other son whom he left in the Territory of War inherit from him, while his *dhimmī* son and his Muslim son do not inherit from him, because the enemy people and *dhimmīs* do not inherit from each other, and the testimony of the enemy people for the *dhimmīs* or the *dhimmīs* for the enemy people should not be accepted.”

[Section 17.2]

Muslim jurists disagreed on the ruling [regarding] the one of the enemy who has been given a pledge of security if he steals, makes a false accusation of fornication, or commits an act which requires a fixed punishment [as stipulated in the Qur'an].

Al-Awzā'ī was asked about [the case of] a group of enemy people who go out for trade [to the Territory of Islam] with a pledge of security, and thereafter one of them commits fornication in the Territory of Islam, steals or [falsely] accuses someone of fornication. He replied: “If they speak publicly among themselves about it or the [punishable act] is committed against us or our *dhimmī* people, they should be given the stipulated punishment because they were not granted a security that [allows them] to commit such acts against us and to express publicly those ill deeds in the Territory of Islam.” (Narrated to me by al-'Abbās from his father from him.)

[25] Also, it was narrated to me by Mu'āwiya from Abū Ishāq that he said: “Someone asked al-Awzā'ī: ‘[What if] people have been granted security and

they intend to return [to the Territory of War], [but] they aggravate each other [by lending money]?' He replied: 'If they litigate before the Imām, he should apply his judgment to what they are quarreling about, in terms of lending [money or property] to each other.' I [Abū Ishāq] asked: 'What if one of them comes [claiming that he has been wronged]?' He replied: 'We will not deal with [his case] unless both [disputing persons] come together for a ruling.' I asked: 'What if one of them consumes intoxicating liquors?' He replied: 'There is nothing with [which to charge] him.' I asked: 'What if he steals some commodities from a Muslim?' He replied: '[His hand] should be cut [off].' I asked: 'What if he commits fornication and he was already married in his country?' He replied: 'The stipulated punishment (*hadd*) should be applied to him, [which is] the lashing, and he should not be stoned.'¹²⁴ I asked: 'What if he [falsely] accuses a Muslim of fornication?' He replied: 'He should be lashed.' I asked: 'What if one of them robs the other?' He did not reply with a definite opinion [regarding this question]. Someone asked him: 'What if a commodity of one of the enemy who has been given security is stolen?' He replied: '[The hand of] the one who did the theft should be cut off.' Someone asked him: 'What if [the Muslim authority] is unable to detain him [i.e., the one who stole the commodity]: shall the Imām disburse it to him [the victim]?' He replied: 'No.'"

Al-Shāfi'ī said: "If [some] people from the Territory of War go out to the Territory of Islam with a pledge of security, and they commit acts which deserve fixed punishments [as stipulated in the Qur'ān], the [meting out of] punishment to them has two aspects: [As for] what is God's right [in the meting out of punishment] and not a human being's right, they may get amnesty [from receiving

that punishment] and also they could falsify the witnesses' testimony that they had committed such acts. Therefore the [meting out] of the punishment is suspended for them because no Muslim has a right [to punish], only God; but it should be said to them: 'You were not granted security to do [such acts], and you either refrain [from doing such acts] or we will invalidate the security [granted to you] and escort you to your secure place [in the Territory of War].' And if they [still] commit such acts, [Muslims] should escort them to their secure place and invalidate the contract of security between [the Muslims] and them. And it is necessary for the Imām when he grants them security to not do so until he can inform them that if they commit such punishable acts, he will apply the punishment to them. [As] for the punishment that human beings have a [right] to, it should be applied to them. Do you not see that if they commit murder we must put them to death? So, if we agree that we should punish them for committing murder because it is the human being's [right], we are obliged to apply [the punishment] for the acts that are less than [murder] in terms of human beings' rights, such as inflicting punishment for a head injury and its compensation, and the [fixed] punishment for a [false] accusation of fornication. As for theft, there are two opinions: First, [their hands] should be cut off and they should be [forced] to pay a fine, because God sanctioned the Muslims' property with the cutting off [of the hand],¹²⁵ and Muslims [used to] fine those who consume money without it being stolen, and it is consumed money [which is stolen], and therefore we approve the fine based on analogy (*qiyās*). Second, the money should be fined without cutting off [his hand], because money is for human beings and cutting for God." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If a group of the enemy people goes out to us having a pledge of security and they loan [money] to each other, and thereafter they present their dispute to one of the Muslim judges, he should judge for some of them against the other and imprison some of them for [the rights] of others regarding what they are obliged to [pay on] the loans. Also, if some of them usurp [the rights of] others by taking their property forcibly, whether or not it was consumed, and then the one whose rights have been usurped pleads to a Muslim judge, the judge should force him [the usurper] to give back what he took, whether or not it was consumed, and he should be subject to imprisonment. Also, if one of them puts to death another, and afterward the blood heir of the person put to death pleads to a Muslim judge, the judge should sentence him [the slayer] to death. Also, if one of [the disbelievers] cuts off the hand or the foot of another [disbeliever] or intentionally tears out his eye, the judge should punish him; and if it was unintentional, the judge should force him to pay blood money (*arsh*)."

They [Abū Ḥanīfa and his companions] said: "If a group of enemy people comes [to the Territory of Islam] with a pledge of security and thereafter one of them commits fornication or robbery, he is not subject to the fixed punishment (*ḥadd*) but he should pay back what he has stolen. And if one of them puts to death a Muslim man, he should be sentenced to death; and if a man from [the disbelievers] [falsely] accuses a Muslim of fornication, he should be subject to the fixed punishment of lashing.¹²⁶ And if one of them commits fornication with a Muslim woman, he is not subject to the fixed punishment, but he should be severely punished. And if one of them [disbelievers] cuts off the hand of a

Muslim man, his hand should be cut off. Also, if some of them borrow [money] from a Muslim, or they forcibly take the property of Muslims, they should be forced to give back what they have taken. And if a Muslim puts to death one of them, he should not be sentenced to death, but he should be forced to pay blood money if the slaying was intentional; and if it was unintentional, his blood relatives (*'āqila*) should pay the blood money, and he should [fulfill] the expiation. Also, if a Muslim [26] cuts off [the enemy person's] hand or foot or tears out his eye or puts to death his son intentionally, he should not be sentenced to death or punished, but he should pay blood money, and if he does this [act] unintentionally, his blood relatives should pay the blood money. And if a Muslim forcibly takes money or property from [a disbeliever] whether or not he consumes it, he should be forced either to return it or to pay its value. Also, if a Muslim takes out a loan from some [disbelievers], he is obliged to return it. And if a Muslim commits adultery with a [disbelieving] woman who enters the Territory of Islam with a pledge of security, he is subject to the fixed punishment but the woman is not. Also, if a Muslim robs some of them, his hand should not be cut off, but he is obliged to pay back what he has stolen. And if a man from the enemy people who has a pledge of security from Muslims puts to death a man from the *dhimmīs*, or cuts off his hand intentionally, he should be physically punished. And if a protected non-Muslim puts to death the one of the enemy or cuts off his hand intentionally, he is obliged to pay blood money without being physically punished. And if a some of the enemy people put to death one of their own, loan [property] to each other, or forcibly take [property] from each other in the Territory of War, and thereafter they come to us with a pledge of security and each of them pleads

to a Muslim judge against the other, they should not be judged on what they did unless they committed such acts in the Territory of Islam, and [in this case] each one of them should pay back what he took except for the fixed [punishment]; and the physical punishments should not be inflicted on them, but they should pay the blood money."¹²⁷

[Section 18]

Muslim jurists concurred without any disagreement among them that it is forbidden for a Muslim to make an unlawful sale to a person given a pledge of security and that this sale should be revoked and invalidated if it was done in the Territory of Islam [similar to] what is revoked with unlawful sales between Muslims.

[Section 18.1]

They disagreed on the permissibility of Muslims buying from him a slave whom he has manumitted in the Territory of War, who has a written agreement of manumission with his master (*mukātab*), or [whose master] has agreed that he [the slave] will be manumitted after his [the master's] death (*mudabbbar*).

Al-Awzā'ī was asked about of a man from the enemy people entering the Territory of Islam with a pledge of security who [brings] with him the [slave] mother of his children and a slave woman he has agreed to manumit after his death, and he wants to sell them. He replied: "If he acknowledges in the Territory of Islam that the first woman is the mother of his children and the other his slave (*mudabbbara*), they should be regarded as [being in] the same [state of slavery], and if he dies in the Territory of Islam, his blood heirs are not allowed to return them to slavery [after being manumitted because of their status]. (Narrated to me by al-'Abbās from his father from him).

He [the father of] al-'Abbās said: "Al-Awzā'ī was asked about a man from the enemy people who has entered the Territory of Islam with a pledge of security

and with him is his slave whom he manumitted in the Territory of War. He replied: 'Both of them are free and secure.'"

Al-Shāfi'ī said: "If one of the enemy commits an act of cruelty in the Territory of War against his slave with whom he has written an agreement of manumission and his slave whom he had [already] manumitted by invalidating the written agreement and returned the manumitted slave to slavery, he is not permitted to sell them in the Territory of Islam,¹²⁸ and his written agreement with his slave is valid and the manumitted slave is considered free. As for the slave whom he has agreed to manumit after his death, he may sell him at any time." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "Whomever one of the enemy forcibly brings with him from the Territory of War into the Territory of Islam with a pledge of security, he may sell and the Muslims may buy him from him unless those he forced are his relatives possessing an unmarriageable relationship to him. In this case he is not permitted to sell any one of them, and Muslims should not buy any one of them because they are manumitted by being his relatives." They [Abū Ḥanīfa and his companions] said: "Also, if the one of the enemy forces his wife [to come to the Territory of Islam], and she bears a child from him or is pregnant by him, he is not permitted to sell her, and Muslims should not buy her from him. Also, if [his slave woman] is the mother of his children and if he takes her with him to the Territory of Islam, he is not permitted to sell her, and if a Muslim buys her, the sale should be revoked."

He [Abū Ḥanīfa] said: "If one of the enemy has manumitted slaves of his in the Territory of War, agrees to have them manumitted after his death, or has

written an agreement with them for manumission, and then he takes them out [to the Territory of Islam] whether forcibly or not, his manumission of them and the written agreement are invalid and he may sell them, and the Muslims may buy them from him; and if he manumits them in the Territory of Islam, he is permitted to do so.” ([Narrated by] al-Lu’lu’ī from them.)

[Section 18.2]

They disagreed on the ruling regarding the one who has been given a pledge of security or the *dhimmī* if it is known that he is a spy for polytheists, writing information about Muslims to them. [27]

Al-Awzā’ī said: “If he is from the *dhimmīs* and he informs the enemy people about Muslim [military] secrets, and he directs them to know these [secrets] or shelters their spies, then he has invalidated his covenant [with Muslims] and he should be taken out from the protection agreement (*dhimma*); therefore the Muslim governor (*wālī*) may put him to death or crucify him. And if he is one who has a peace agreement with Muslims (*muṣālah*) and he has not become a *dhimmī*, then the agreement with him is invalid and he should be fought,

For Allah loveth not the treacherous. [Qur’ān 8:58]

(Narrated to me by al-‘Abbās from his father from him.)

Al-Shāfi‘ī said: “If a polytheist from the *dhimmīs* is known to spy on Muslims for polytheists, directing them to their secrets, he should be subject to severe punishment without being put to death and his covenant is not invalid. And if he was given a peace agreement for a certain time, his covenant is invalid, and

if he reaches his secure place [in the Territory of War] he should be fought unless he embraces Islam or becomes one from whom the poll-tax is accepted and he gives [the tax]." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If the Muslim governor arrests a spy from the polytheists who has entered the Territory of Islam without a pledge of security, the Imām should put him to death, not granting him clemency unless he has embraced Islam; and if the Imām finds that he was a Muslim spy, he should punish him severely and imprison him for a long time, until he has truly repented. And if a spy for polytheists enters the Territory of Islam with a pledge of security without trading, and it becomes known that he is a spy for polytheists and he has been sent to the Imām, the Imām should expel him from the Territory of Islam to his secure place in the Territory of War. And if he comes to the Territory of Islam having a pledge of security and coming for trade, and thereafter it becomes known that he has been a spy for polytheists, writing to them about Muslim [military] secrets, and he is taken to the Imām, the Imām should punish him severely and then escort him to his secure place in the Territory of War. And if one of the *dhimmīs* who resides in the Territory of Islam is known to be writing to the enemy people, showing them Muslim secrets, this act does not invalidate his covenant [with Muslims], and the Imām should punish him severely and imprison him for a long time until he truly repents and promises not to commit such acts any more, and [the Imām] should not put him to death."

[Section 19]

They [Muslim jurists] agreed unanimously that injuries inflicted by enemy people against each other in the land of the enemy and whatever [properties] they usurp from each other before they become Muslims are void, and the ruler of Muslims should not look into such grievances if those people embrace Islam or enter the territory of Islam with a pledge of security. The same is true regarding the injuries they inflict upon Muslims during wars in enemy territory, and their usurpation of Muslims' [property] before they embrace Islam or enter Islamic territory [with a pledge of security].

[Section 19.1]

They disagreed on the ruling regarding the injuries they inflict, loans, and usurpations [of others' properties] and on applying the *ḥadd* on those who commit such crimes, if they commit such actions after they become Muslims and before leaving the Territory of War for the Territory of Islam, or if a Muslim commits such a crime after entering enemy territory with a pledge of security. This is after all jurists agreed that whatever they do when their territory becomes an Islamic territory, void of any polytheism, or when Islamic rulings become dominant and the territory is governed by Muslims, that [in such a case] the rulings concerning them are the same as for Muslims or non-Muslims living in the Territory of Islam.

Al-Awzā'ī said: "If a [Muslim] man enters enemy territory with a pledge of security, it is forbidden for him to deal with usury in his commerce with them."
(Narrated to me by al-'Abbās from his father from him.)

Mu'āwiya narrated to me from Abū Ishāq that he said: "I asked al-Awzā'ī: 'If Muslim captives are ransomed and they return to the Territory of Islam, and among them are those who have committed fornication, consumed an intoxicating

drink, committed murder, falsely accused [someone] of fornication, injured each other, or been in debt to another person, [what is the ruling concerning them?]' He [al-Awzā'ī] replied: 'If witnesses provide testimony that [he has committed such action], the rights of the victims will be honored by inflicting the relevant punishment, whether the crime is murder, accusation of fornication, etc. The *hudūd* must be applied on such a person [28] unless the crime is committing fornication with a woman from the enemy people and the Muslim claims that he is in doubt [about the criminality of his action].'"

Al-Shāfi'ī said: "This person should be judged for all these [crimes] according to the ruling concerning the one who commits the same [crime] in the Territory of Islam." (Narrated to me by al-Rabī' from him.)

He [al-Shāfi'ī] also said: "If a Muslim enters the Territory of War with a pledge of security and he takes a loan from one of the enemy people, then the person who has lent him the money comes to the Territory of Islam, entering with a pledge of security, I judge that he [the Muslim] should return the loan, similar to the judgment regarding [a loan] taken by a Muslim or a *dhimmī* in the Territory of Islam. This is because the judgment concerning Muslims is applied wherever they are. It does not void the rights [of others] towards him if he is in any specific place, similarly to the [rule] that the prayer may not be cancelled if he is in the land of polytheism."¹²⁹

Abū Ḥanīfa and his companions said: "A group of Muslims enters the Territory of War with a pledge of security for trade, and they find a group of enemy people, some of whom have embraced Islam while others have not. Then, the Muslim merchants, who have entered the Territory of War, either lend money

to those who have embraced [Islam] or to those who have not, commit crimes (*jināyāt*) against them, whether physical injury or less than that, usurp from them money and goods, and consume some of them and leave the rest unconsumed; or the enemy people, whether those who have embraced Islam or those who have not, do the same to the Muslims. Then, if all the enemy people [in that city] embrace Islam and they come to the Territory of Islam and ask [a judge] for litigation, we judge [in such cases] that all the injuries they inflicted on each other, such as murder, and whatever one side did to the other, unintentionally or intentionally, and the consumed usurped property, should be absolved. As for the loan and dowry, I would give what each deserves from [the property] of the others. As for the unconsumed usurped property, I judge that whoever has in his hand any part of it, he should return it to its owner, but I would not force him to do so. I also judge that any Muslim who enters the Territory of War and puts to death someone who has already embraced Islam should pay the assigned expiation. As for the Muslim who puts to death someone who has not embraced Islam, there is no expiation to be paid. There is no blood money that needs to be paid by an enemy person who has embraced Islam if he puts to death Muslim merchants [in the Territory of War], but he must pay the assigned expiation. Moreover, if a group of Muslims enters the Territory of War as merchants, then they either put to death each other or usurp money or goods from each other and consume them or leave them unconsumed, then they return to the Territory of Islam and present their cases in front of a judge, I would judge to give the rights to the victims, and I would obligate each one to pay back what he usurped from the other. But I would not prescribe any punishment in the case of the false

accusation of fornication nor would I apply the *ḥadd* on anyone of them. I would avoid applying the *ḥudūd* because they committed such [acts] in the Territory of War in which Islamic rulings do not apply. I would, however, judge to obligate those who inflicted injuries on others to pay a compensation (*arsh*) and blood money in case of murder, whether intentional or unintentional. Those who should pay the blood money do not have to do so in the Territory of War, because this happened in the Territory of War and Islamic rulings do not apply to [the one who committed the crime there].” [Another case is as follows:] a group of Muslims, who are captives in the hands of polytheists, either lend money to each other, put to death each other, inflict injuries on each other, or usurp each other’s property or goods and consume it or leave some of it unconsumed, then those captives escape from the polytheists and Muslims save them from their hands, and one of them complains [to a judge] about what the other did to him. Abū Ḥanīfa used to say, in such a case: “If Muslim captives, who are in the hands of polytheists, commit crimes against each other, it is the same as the case of enemy people who have embraced Islam: there should be no prosecution of whatever they transgressed against each other except if it were a loan, dowry, or an unconsumed usurped property. [In such cases,] I would instruct them to return it, but I would not force them to do so.”

[29] Zufar, Abū Yūsuf, and al-Lu’lu’ī said: “If Muslim captives commit [such crimes] in the Territory of War, their case is similar to a group of Muslims who enter the Territory of War with a pledge of security, transgress against each other, and then leave for the Territory of Islam. We judge in all such cases to prosecute those crimes and obligate the guilty parties to pay whatever is

necessary. But the *ḥudūd* and *qiṣāṣ* should not apply to them. They, however, should be responsible for payments concerning crimes (*jināyāt*) and injuries, whether intentional or unintentional, with regard to their properties. Their blood relatives, who are responsible for paying the blood money, are not obligated to pay in cases of unintentional [damage] but should pay expiation for murder and unintentional [damage].”

Abū Ḥanīfa said: “If Muslim captives and a group of enemy people who have embraced Islam or a group of enemy people who have not embraced Islam inflict injuries upon each other, engage in acts of murder against each other, lend money to each other, or usurp property from each other, then all the people in this territory become Muslims and leave for the Territory of Islam, I would not prosecute any such [crimes] except a loan, dowry, or unconsumed usurped property. In such a case, I judge that they should pay it back, but I would not force them to return it [to the owner].”

Zufar, Abū Yūsuf, and al-Lu’lu’ī said the same, except in the case of the unconsumed usurped property in which they said: “They must return it or pay it back.”

Abū Ḥanīfa said: “If a Muslim enters the Territory of War trading, there is no harm if he sells dead animals to [enemy people], one *dirham*¹³⁰ for the value of two, or one *dīnār* for the value of two, and also there is no harm if he takes their properties in any way, using any stratagem if [the disbelievers] consent [to such dealings] whole heartedly.”¹³¹ He also said: “The Muslim, however, is not allowed to buy from them a *dirham* for the value of two *dirhams* or a *dīnār* for the value of two *dīnārs*, and he should not buy dead animals from them nor should he

engage with them in usurious dealings if the interest (*faḍl*) is collected by them. But if he collects the interest, there is no harm [in having such a deal]. Also, there is no harm if he engages with them in risk insurance transactions (*mukhāṭara*) if the payment (*jaʿl*) is made by them. But he must not deal with such an insurance transaction if he has to pay, because in such a case there will be an interest for them that he has to pay, and I dislike such a transaction.”

Abū Yūsuf and al-Luʿluʾī said: “We dislike all such dealings whether he sells to them or buys from them two *dirhams* for the value of one, dead animals, and [any] risk insurance on something, as we dislike that among Muslims. If he engages in such dealings and acquires interest in his hand, we would order him to return it to them, and if he does not do so, we would not force him.”

Abū Thawr’s opinion, in all these cases, is similar to that of al-Shāfiʿī.

[Section 19.2]

They disagreed on the permissibility of applying the *ḥudūd* in enemy territory.

Malik said when he was asked about applying the criminal punishments (*qiṣāṣ*) on Muslims in enemy territory: “*Ḥudūd* [must be applied] in enemy territory.” Someone asked him: “How about the punishments that the Muslim governor (*wālī*) neglects or postpones until they [the guilty persons] come to the Territory of Islam?” He [Mālik] replied: “It is my opinion that the punishment should be applied in the Territory of Islam if [the Muslim leader] neglects this application in enemy territory or has been occupied with fighting the enemy. So, if he has been busy besieging a fortress, for example, or an enemy that is very close [to the Muslim army], in such cases I see a reason for delaying the

application of the punishment. If he delays applying [the *ḥadd*] until the person who has committed the crime returns to the Territory of Islam, the punishment must be applied whether it is a *ḥadd* or *qiṣāṣ*. Therefore, if what you describe as being occupied [with fighting the enemy] is true, then there is an acceptable excuse for delaying the application of the *ḥadd* or *qiṣāṣ*." (Narrated to me by Yūnus from Ashhab from him.)

Al-Awzā'ī said: "Anyone who commands the army in a military expedition [to the enemy territory], even if he is not the *amīr* of Egypt, Syria, or Iraq, should apply the *ḥudūd* in cases of false accusation of fornication and drinking an intoxicating drink, but he should refrain from cutting off [the hands of thieves] for fear [that the thief] may join the enemy. When he [the Muslim commander] disengages from the place of the enemy and returns [to the Territory of Islam], he should cut off [the hands of thieves]." (Narrated to me by al-'Abbās from his father from him.) I was told by Mu'āwiya from Abū Ishāq who said: "I asked al-Awzā'ī, 'Do you think that the *ḥadd* should not be applied in enemy territory?' He replied: 'Yes, but when they return, the *ḥadd* should be applied on him [the guilty party].'"

Al-Shāfi'ī said: "The army commander should apply the *ḥudūd* in whatever land he is if he has been given the authority to do so. But if he has not been given the authority, the witnesses who testify in the case in which the *ḥadd* must be applied should take the accused person to an *imām* who has been given the authority to do so, whether in the Territory of War [30] or the Territory of Islam. There is no difference between the Territory of War and the Territory of Islam concerning what God has commanded to the people [to apply] the *ḥudūd*."

He [al-Shāfi‘ī] said: “Our opinion is the right one, and it is compatible with the Qur’ān (*tanzīl*) and *sunna* and what Muslims understand and concur on, that whatever is permitted in the Territory of Islam is permitted in the Territory of Disbelief.¹³² Whatever is forbidden in the Territory of Islam is forbidden in the Territory of Disbelief. Therefore, whoever commits a forbidden act should be subjected to God’s *ḥadd* according to His will. The territory of disbelief does not invalidate [any such rulings]. Someone might say: ‘Applying the *ḥudūd* should only be done in the major Muslim provinces, and whoever commits an act punishable by a *ḥadd* in one of the rural areas (*bādiya*) of the Territory of Islam should not be subjected to the *ḥadd*.’¹³³ I do not know any Muslim who says such a thing. Whoever commits an act punishable by a *ḥadd* in a city (*ḥaḍar*) and there is no authorized governor who can administer the punishment, the governor in the adjacent province should apply the *ḥadd* on him. The same thing [is true] with the appointed army commander (*‘āmil*): if he is authorized to apply the *ḥadd*, he should apply it. But if he is not authorized to apply the *ḥadd*, the nearest authorized [leader] should apply it, and the same is true regarding issuing the ruling. [The case] is the same whether the punishment is cutting off [the hands of thieves] in the Territory of War or a ruling that does not require such punishment.” (Narrated to us by al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “If a military detachment with its commander enters the Territory of War and they were sent to the Territory of War by the caliph, the commander may not apply the *ḥudūd* on the people of this military unit as long as they are in enemy territory.” They also said: “If one of them [combatants] commits fornication with a person in the detachment’s camp

(*askar*) while they are in the Territory of War, and then the incident is reported to the detachment's commander, he should not apply the *ḥadd* for fornication but should discipline him. The same is true if a man from the detachment steals from another member of the detachment and it is reported to the commander: the latter should not cut off his hand but should obligate him to pay back what he has stolen if he has already consumed it. And if a person is brought to the detachment's commander for drinking an intoxicating drink, the commander should not apply the *ḥadd* but should discipline him. If a person from the detachment commits highway robbery against another [detachment member] and takes his property and puts him to death, then the crime is reported to the detachment's commander, the latter should obligate the guilty person to be responsible for returning the property, and he should also pay blood money to the heirs of the slain person. The commander should not put to death the murderer for [committing] his crime, and he should not apply the *ḥadd* for highway robbery. He should not cut off his hand and his leg or crucify him but should only discipline him.¹³⁴ This is the case for *ḥudūd* and *jināyāt*: the commander of the unit should not apply the *qiṣāṣ* or *ḥadd*, but the guilty person should be responsible for paying the blood money for the crimes that he commits inside the military camp or outside. If the [Muslim] army enters the Territory of War under the leadership of a commander and they are five thousand, four thousand, or the like, they should be considered similar to a detachment in all that we have described.¹³⁵ [The commander] should not apply any of the *ḥudūd* or *qiṣāṣ* in the Territory of War until he [the guilty person] returns to the Territory of Islam, and then their case should be submitted to a Muslim judge. The judge will prescribe punishments for the guilty person, but the

ḥudūd become inapplicable except for the crime of false accusation of fornication. As for drinking an intoxicating drink, the judge should not apply the *ḥadd* after one or more days after [consuming the drink].”

They [Abū Ḥanīfa and his companions] also said: “If the caliph enters the Territory of War commanding the soldiers [in a military expedition], and a man is brought to him for drinking an intoxicating drink in the camp (*‘askar*) or for committing fornication or theft, [the caliph] should apply the *ḥadd*, be it the *ḥadd* for fornication, stealing, or drinking an intoxicated drink. All the *ḥudūd* and *jināyāt* that necessitate *qiṣāṣ* must be applied to the guilty person if [the crime] is committed in the caliph’s camp.” They also said: “If a man leaves the caliph’s camp, looking for fodder, to a place distant from the camp and commits fornication, drinks an intoxicating drink, or steals from another Muslim who is with him, then he is reported to the caliph, the latter should not apply any [*ḥadd*] concerning such crimes. This is because the guilty person has committed [such crimes] in the Territory of War and not the caliph’s camp. All the *ḥudūd* and *jināyāt* do not apply to him. There is no *qiṣāṣ* except being obliged to return the stolen money.” They also said: “The caliph’s camp in the Territory of War is regarded as one of the Muslim provinces in the Territory of Islam in terms of applying the *ḥudūd* and other [related punishments], and the same [applies] if the caliph sends detachments from his camp or what amounts to a detachment into the Territory of War from the Territory of Islam.” They [also] said: “If the caliph does not enter [31] the Territory of War but sends the governor of Syria, Iraq, or Hijaz commanding the soldiers to the Territory of War, the latter’s camp in the Territory of War will be regarded as the caliph’s camp.”

Abū Thawr's opinion, regarding the previous questions, is similar to that of al-Shāfi'ī.

[Section 20]

They [Muslim jurists] agreed unanimously that if an enemy person embraces Islam in the Territory of War and he receives knowledge, from a trustworthy [Muslim], of the religious obligations that Muslims should abide by, this person should not be excused for ignoring what he is obligated to do or for doing what he has to refrain from doing.

[Section 20.1]

They disagreed on other cases [related to this question].

What is obligatory, according to al-Shāfi'ī's opinion, is that [if] the one [enemy person] embraces Islam in the Territory of War and then a trustworthy [Muslim] informs him of some religious rulings, then [al-Shāfi'ī] obligates this person to abide by all the religious obligations of which he has received knowledge from [the trustworthy Muslim].

Abū Ḥanīfa said: "If a man from among the enemy people embraces Islam in the Territory of War and he lives days, months, or years without knowing the obligation on Muslims to perform the ritual prayer, then he knows afterward that he is religiously commanded to perform the prayer, he should not perform the prayers that he missed,¹³⁶ because he did not know that he was obligated to pray, until he has been told by two trustworthy Muslims. If the two [Muslims] tell him of his obligation to pray and then he does not pray some prayers for the reason of doubting [such an obligation], and he continues for days, months, or years to not perform prayers out of doubt, he should perform every prayer he missed since the time in which the two Muslim men had informed him. He should not, however,

perform what he missed before that. If a man, woman, boy, concubine, male slave, or a *dhimmi* informs him [of his obligation to pray], he is not obligated to perform what he missed in the territory of polytheism, whether he informs him while he is in the Territory of War or after he enters the Territory of Islam. And if a man enters the Territory of Islam after he has embraced Islam and stays for [a number of] days in the Territory of Islam, then two trustworthy men tell him about his obligation to pray, he is not obliged to perform what he missed neither in the Territory of War nor in the Territory of Islam, except from the time that the two trustworthy men informed him [about his obligations]." He [Abū Ḥanīfa] [also] said: "The same [ruling applies] to alms-giving and fasting."

Abū Yūsuf said: "He should perform the prayer, pay the [obligatory] alms, and do the fasting that he missed in the Territory of Islam before he acquired knowledge [of the obligation], but he is not obliged to redo all that he missed in the Territory of War. If he gains knowledge of any [such obligations] in the Territory of War and then quits after acquiring this knowledge, he should redo what he missed after the time in which he acquired the knowledge. Knowledge is his [Abū Ḥanīfa's] saying: 'If he gains knowledge from two men or a man, woman, slave, boy, *dhimmi*, or an enemy person that Muslims do such obligations, he should perform whatever he missed after he was told' [provided that] the information was correct."

Zufar and al-Lu'lu'ī said: "He should redo whatever he misses from the prayers, fasting, and paying the obligatory alms since the time he embraced Islam, whether he misses that in the Territory of War or the Territory of Islam, before acquiring knowledge of [the obligation] or after. He should redo all of that."

**The Opinions Concerning Rulings on the Dedicated Extra
Shares of Spoils (*anfāl*) and Booties (*ghanā'im*)¹³⁷**

God said:

And know that out of all the booty that ye may acquire (in war), a fifth share is assigned to Allah and to the Messenger, and to near relatives, orphans, the needy, and the wayfarer.

[Section 21]

[Muslim] authorities agreed unanimously that four-fifths of the booty is assigned to the combatants.

[Section 21.1]

They disagreed on who among the combatants deserves [the booty]. We will mention all such [disagreements] by the will of God. Among the questions that they disagreed upon is the backup army that joins the main army which has already engaged in battle, and they have already collected the booty but have not yet divided it up [among the combatants] or taken it out of the Territory of War. [32] Also, [they disagreed on the case] if a detachment or an army leaves [to the war front], and some of the combatants participate in the combat while others cannot fight for a legitimate reason.

Mālik was asked about [Muslim] boats that leave to engage in war with the enemy. When [the combatants] are on their way [to enemy territory], a strong wind forces some of them back to Syria and others to Egypt. The army [that is able to continue toward the front] enters the territory of the Byzantines and acquires booty. "Do those [who could not make it to the battlefield] have any right to some of this booty? Should the army [which acquired the booty] allocate [a share] to them?" He replied: "If it is established beyond doubt that the wind

was responsible for turning them back and that their return was unintentional, their share of the acquired booty should be given to them.” (Narrated to me by Yūnus from Ibn Wahb from him.)

Yūnus narrated to me from Ashhab that he said: “Someone asked Mālik: ‘Sea raiders left Egypt in their boats and were away from the people, then one of the boats broke and they [the boat riders] stayed behind to fix it, and we left them. When they feared that a wind might blow them into enemy territory, they went to Syria. Do you think that they should have a share with the rest [in the booty]?’ He [Mālik] replied: ‘They traveled but they returned. Do you think that if they traveled and their boat broke or they became sick and returned [that they should receive booty]?’ He was told that ‘they entered the Byzantine’s territory.’ He asked them: ‘Did they reach Cyprus?’ He was told: ‘Yes, they even reached beyond [Cyprus] into the Byzantines’ territory when that [problem with the boat] occurred and they feared for their lives so they left for Syria [waiting for us] until we came to them.’ He said: ‘It was clear to me before that they did not deserve anything, but now I hear you say that they entered deep into the territory of the Byzantines and engaged in battle, and I see that some of them might have died [in battle].’ It was said: ‘Yes, two men, and their engagement in battle became clear. They were excused for their fear [of being captured by the enemy]. We even thought that they were captured by the enemy.’ He said: ‘If such a complication occurred, I prefer that they be given a part of the booty.’”

Al-Awzā‘ī was asked about [the case of] [Muslim] army combatants who enter the Territory of War and acquire booty. Then another [Muslim] army joins them before they go back to the Territory of Islam, and [the two Muslim armies]

do not face an enemy in battle until they take out the booty to the Territory of Islam. He replied: "It used to be the case that two groups of Muslims would gather together in the land of the Byzantines and each one would not share with the other's acquired booty. This happened without any objection from a political authority (*wālī*), a religious authority, or any group [of Muslims]." ¹³⁸ (Narrated to me from al-'Abbās from his father from him.)

Al-Awzā'ī also was asked about army [combatants] who go raiding in the Territory of War and acquire booty. Then another [Muslim] army joins them before they leave for the Territory of Islam. They [both armies] do not face an enemy until they take the booty out to the Territory of Islam: "Should [the second army] have a share [in the booty]?" He replied: "If they join them and the commander [of both armies] is the same person, they should share the booty with them. But if they do not join them, and each [army] travels alone raiding in enemy territory, then each army retains its own booty without sharing it with the other."

Al-Shāfi'ī said: "If the army receives military backup and the war has already ended and the booty collected, [the backup army] does not receive anything from the booty since its combatants did not join the [original] army [in the combat]. But if the backup army comes and the war has not yet ended, and the backup army participates in battle, they should share the booty with [the original army] because the booty cannot be collected unless the war ends." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If a Muslim army acquires booty in the Territory of War, then another army reaches them from the Territory of Islam before they transfer the booty to the Territory of Islam, the booty should be

divided up between those who acquired it and those who joined them, because the latter has been backing up the former. Also, if a detachment joins the main army before the army leaves for the Territory of Islam, the detachment's combatants will share the booty with the main army, whether they fight [the enemy] after they join them or not."

Abū Thawr said: "The booty is for the one who participates in the battle. As for someone who comes after combat has ended and he is not [33] part of the [original] army, he does not have any right to the booty." He also said: "If the army has detachments, these share in the army's [booty] and vice versa if there is only one army. But if there are two armies isolated from each other, each one of them does not share [the booty] with the other." He [Abū Thawr] said: "I do not know of any disagreement among scholars on this issue."

[Section 22]

[The consensus concerning the detachment's share in the army's booty and vice versa]

Yūnus narrated to me from Ibn Wahb from Mālik; al-'Abbās narrated to me from his father from al-Awzā'ī; 'Alī narrated to me from Zayd from al-Thawrī; al-Rabī' narrated to us from al-Shāfi'ī; al-Lu'lu'ī narrated from Abū Ḥanīfa and his companions; all of them, in addition to Abū Thawr, said that the detachment's [booty] should be shared with its main army. This happens if a detachment leaves the Muslim army with the permission of the Imām in the Territory of War and acquires booty; four-fifths of the booty should be divided up between the detachment's combatants and those of the army. All of [the aforementioned jurists] also said that if the army's combatants acquire booty after the detachment leaves them, they should share the booty with the detachment's combatants. This is the same as when the detachment acquires the booty and shares it with the army's combatants.

[Section 22.1]

They disagreed on [the share of the booty] for a detachment that comes to a [Muslim] city that has been approached by the enemy, and the detachment attacks the enemy forces and acquires booty. [They disagreed] on whether the detachment's combatants should divide up the booty between them and the city's people. [They also disagreed on how the booty is to be divided] if the main army marches into enemy territory but is isolated from the detachment.

Mālik was asked about the Byzantines who raided near al-Miṣṣāsa and the townspeople knew about it. Then, someone shouted: "O May God's horses be ridden [by the Muslim combatants]!" and the active and strong [among the townspeople] rode and faced the Byzantines in battle in their land [that was the nearest the Muslim land]. They [the Muslims] put them to death and acquired booty. Then, [the rest of] the people of the town said: "We should receive a share of the booty with you. You left from our town [to fight the enemy] and you kept with us your children and wives." Mālik contemplated the question and then replied: "I do not see that [the booty] should be given except to those who raided and acquired it." (Narrated to me from Yūnus from Ashhab from him.)

Al-Awzā'ī was asked: "What do you think if enemy [combatants] reach our city and we gain booty from them: should the booty be divided up between those who acquire it and [the rest] of the city's people?" He replied: "If the enemy camps at Nahr al-Dhi'b or the like and some [Muslims] leave to fight them and they acquire booty, they do not share it with the city's people after giving the one-fifth [share]. But if the enemy camps near the city and the city's people leave to fight them one after the other so that some of them guard and others bring food to [the Muslim combatants], and the latter receive support from the city, they all share in the acquired booty after taking out the one-fifth [share]. And for those who go to fight [enemy combatants] who have camped at Nahr al-Dhi'b, they should be given the dedicated extra shares of spoil (*nafl*) and the spoil of enemy combatants whom they have put to death (*salab*)."¹³⁹ (Narrated to me from Mu'āwiya from Abū Ishāq who said: "I asked him [al-Awzā'ī] that.")

Abū Ishāq said: "I asked al-Awzā'ī: 'What do you think if the enemy leaves the [Muslim] city, and some Muslim horsemen or a frontline military unit (*maṣlaḥa*) follows them and acquires what they leave behind, such as animals or goods?' He replied: 'All this is the same. I see that they should share the acquired booty with the city's people.' I [Abū Ishāq] asked [al-Awzā'ī]: 'What if an enemy army comes to attack the city and Muslim horsemen, or a frontline military unit leaves [the city] to fight the enemy about two or three miles¹⁴⁰ away and they acquire booty?' He [al-Awzā'ī] replied: 'They should take the booty for themselves after taking out the one-fifth [share]. Those [Muslim combatants] also have the right to take the spoil of enemy combatants whom they put to death, and they should be given [shares] from the extra spoils of war.' He [al-Awzā'ī] was asked: 'What if the foot soldier stays on guard when they leave the city to spy on the enemy, and two horsemen leave for this mission to guard them, and they are accompanied by others who stay at the city's gate and the two horsemen might get booty from the enemy?' He [al-Awzā'ī] replied: 'The booty is for the two horsemen after taking out the one-fifth [share]. But if the two horsemen ask for help and the people at the rear [of the mission] or the city's people help them, they all share [in the booty].' He was also asked: 'A detachment from al- was sent [to fight the enemy]. Then the detachment met with another one in the enemy territory. Do both share the booty that was acquired by the first one?' He [al-Awzā'ī] replied: 'No, unless they joined together and acquired the booty while they were together.'"¹⁴¹

According to al-Shāfi'ī's opinion, [34] if the enemy attacks a Muslim fortress, and all the people [inside the fortress] fight them, or some of them fight

the enemy and others help them in a way that stops the enemy attack and supports the Muslim combatants to overcome the enemy, then everyone who deserves a share in the booty should be given one. Also, anyone who does not come down [from the fortress] to fight the enemy or help in that effort should not be given any share. Al-Rabī' narrated to us from him [al-Shāfi'ī] that he said: "The detachment has a share in the army's booty and vice versa if each one helps the other. But if they are divided and march separately in enemy territory, they should not share the booty. As for [the case of] two separated armies, each one should not share the booty with the other, since they are not one army and they do not support each other by reinforcing each other's strength." He [al-Shāfi'ī] said: "If it is permitted for one of these two armies to share [the booty] with the other, it will permit the people of Tarsus and 'Ayn Zarba, for example, to share the booty with the combatants who enter enemy territory [from a place near them], because if those combatants ask for help, they [the city's people] will send help to the enemy territory near them. Only the army that enters [enemy territory] as one army may divide up the booty among all its combatants even if it is separated [into groups] that do not meet together in one place [in enemy territory]." Al-Rabī' narrated to us from al-Shāfi'ī that he said: "If [Muslim] people reside in their country and a group of them leaves [to fight the enemy] and acquires booty, the country's residents should not take a share from the booty even if they are near [the place of combat]."

[Section 22.2]

They disagreed on the case of the one who joins the Muslim army in the Territory of War before the booty is distributed but after the war has ended.

According to Mālik's opinion, there is no share in the booty for this person.

Al-Awzā'ī said: "Whoever embraces Islam in the territory of polytheism and leaves to escape with his religion to God and Islam, then he reaches Muslims in the Territory of War before they divide up the booties, this is the [religious] emigrant, and it is incumbent on Muslims to give him a share [in the booty]." (Narrated to me from al-'Abbās from his father from him.) He [al-Awzā'ī] was asked about a [Muslim] merchant in the Territory of War and a person who has embraced Islam, and both join the Muslim [army] before they divide up the booty. He replied: "Whoever joins the Muslims in the Territory of War before the booties are divided up should have a share, because God's messenger gave a share to women and boys, and those were weaker in helping the Muslim [army] than the men who joined the Muslims."

Al-Shāfi'ī said: "Whoever participates in combat and has either embraced Islam and left the Territory of War, embraced Islam after living with Muslims as a polytheist, been a slave who has been manumitted, or has come [to Muslims] from wherever he has come from, and the war has not yet ended, he may have a share in the booty. This is because the booty is collected only after the war ends. Whoever comes [to Muslims] after the war ends, despite the fact that the booties have not yet been collected, should not be given any share in the booties. This is because booty is for the one who participates in combat." (Narrated to us from al-

Rabī' from him.) He [al-Shāfi'ī] said: "The same [rule] applies in the case of the merchant."¹⁴²

Abū Ḥanīfa and Abū Yūsuf said: "If Muslims acquire booty in the Territory of War, then one of the enemy people embraces Islam and joins the Muslims before transferring the booty to the Territory of Islam, and they [the Muslims] have not engaged in combat or acquired any new booty since the person who has embraced Islam joined them, he does not receive a share in the booty that they acquired before he joined them. Also, if the person who has embraced Islam and joined the Muslims fights with them without acquiring any booty, he should not have a share in the booty that was acquired before he joined them. [If they acquire] more booty, he should be given a share with the army's combatants in the two booties. And if a Muslim merchant enters the Territory of War with a pledge of security, and when he hears that Muslims have acquired booty he joins them, he should not have a share in this specific booty unless they acquire booty after he joins them, then he should be given a share from the two booties. Also, if a man from the military camp's people comes as a Muslim servant with a man from the army's combatants to provide service for him, and when the Muslims acquire the booty he says: 'I will fight with you,' or if one of the army combatants frees a slave for him after they acquire the booty, he should not be given a share in the booty unless he participates in the combat afterward and they acquire booty. In such a case, he should have a share in both booties. Also, if one or two men from the volunteers (*muṭawwi'a*) or others join the Muslims' army after they acquire booty in the Territory of War, they should not have a share in this booty unless they participate in combat and acquire [new] booty, then they should have

a share in both booties. And if a Muslim who has been a captive in the hands of polytheists and the latter captured him before a specific military expedition, and in this expedition the Muslims acquire booty and save him, or he escapes from them [the disbelievers] after the Muslims have acquired the booty and he joins them, he should not have a share in the booty unless he participates in combat and they acquire booty after he joins them, then he should have a share in both the first and second booties. Also, if a [Muslim] man converts from Islam [to another religion] and goes to the Territory of War, then the Muslims acquire booty in the Territory of War and the apostate has converted back to Islam and joined the Muslim [army], he should not have a share in this booty unless he fights with them and they acquire another booty before they divide up the first, then he should have a share in both of them."

Al-Lu'lu'ī said: "Anyone who joins the Muslims from among those whom we have named, after they collect the booty, should not have a share unless they engage in combat and he is with them, then he should have a share specifically from the second booty and should not receive any share from the first one in which he did not participate."

Abū Thawr said: "If the people acquire booty and collect it, and there was no prohibition from acquiring [it] except stealing, the booty is for those who participate in the combat and not for anyone who comes afterward to share with them their booty."

[Section 22.3]

They disagreed on the share of the one who dies or is put to death before the booty is collected.

Mālik was asked about [the case of] a man who fights for the sake of God and is put to death, then the Muslims conquer the [enemy territory]. “Do you think that his heirs should be given a share from the collected booty?” He replied: “He should have a share in the booty, and what would be the reason for denying him that?” He [Mālik] was asked: “What if they conquer the enemy [territory] a day after he dies?” He replied: “Yes.” He [Mālik] was [further] asked: “How about a man who leaves for a raid and dies before the fighting starts, then [the Muslim combatants] occupy a place [in the enemy territory] and acquire booty? Do you think that he should be given a share?” He replied: “No.” Then [the inquirer] asked, “Even if this person leaves his home and travels for one or two days?” in an attempt to get [Mālik’s] approval for giving him a share. Mālik responded: “There are clear things,” and what he meant is that he [Mālik] does not think that this person deserves a share. (Narrated to me from Yūnus from Ibn Wahb from him.)

Yūnus narrated to me from Ibn Wahb that he said: “I asked Mālik about [the case of] a man who leaves [his home] and dies in a raid. Should he be given a share after his death for his heirs, or he should not get anything because he did not witness the people when [they distributed the booty]? Mālik replied: ‘I do not think he deserves anything.’”

Al-Awzā‘ī said: “God’s messenger gave a share to a Muslim man who was put to death in [the battle] of Khaybar. All the *imāms* of guidance and jurists

have agreed to give a share for the one who dies or put to death after he leaves [his residence] to [fight] for the sake of God.” (Narrated to me by al-‘Abbās from his father from him.)

Al-Thawrī was asked about [the case of] a person who dies in the Territory of War, and he [al-Thawrī] did not think he should be given a share even if he travels [to reach the place of fighting], unless he acquires a booty on the day he dies. (Narrated to me by Mu‘āwiya from Abū Ishāq from him.)

Al-Shāfi‘ī said: “If he dies before they collect the booty, he does not deserve anything. But if he dies after they collect the booty, his share should be [given] to his heirs.” (Narrated to us from al-Rabī‘.)

Abū Ḥanīfa and his companions said: “If a man from the Muslim army dies after collecting the booty, and he dies in the Territory of War before transferring the booty to the Territory of Islam, his share is cancelled and his heirs do not deserve anything. And if he is put to death [in battle] or the enemy captures him before the booty is transferred to the Territory of Islam, he or his heirs do not receive a share in the booty. But if Muslims transfer the booty to the Territory of Islam then a man from the army dies, his share should be given to his heirs.”

Abū Thawr said: “If he dies after they collect the booty or transfer it [to the territory of Islam], his share should be assigned and given to his heirs, because the share should be given to him if he participates in [the combat].”

[Section 23]

They [Muslim jurists] unanimously agreed that if a sick person witnesses combat with the army in the Territory of War but does not fight, he should be given his share from the booty.

[Section 24]

[Muslim] authorities agreed unanimously that whatever booty the army acquires in enemy territory, four-fifths of it should be given to those who fight to get it if [the combatants] enter enemy territory with the permission of the Imām. No one else has a right to it.

[Section 24.1]

They disagreed on the case if they [Muslim combatants] enter enemy territory without getting the Imām's permission.

Mālik said concerning [the case]: "The rule concerning the one whom the Imām (*sulṭān*) does not permit is the same.¹⁴³ The authority of God is higher than the authority of [His] servants." (Narrated to me by Yūnus from Ibn Wahb from him.)

Al-Awzā'ī said, concerning a man or two men who go [to fight] without the permission of their Imām, "He [the Imām] may punish them and deny them [a share in the booty] or he may forgive them and take the one-fifth [share] from their acquired booty and then divide [the rest] between them. A group of *dhimmīs* was held captive in enemy territory, and they escaped with part of their [acquired] properties. 'Umar b. 'Abd al-'Azīz gave them from the spoils of war what [they had acquired]." (Narrated to me by al-'Abbās from his father from him.)

Al-Awzā'ī was asked about a group of Muslims who go out of the military camp without the permission of the Muslims' Imām, and they acquire booty and then give it [to the Muslim authority]: "[In this case], do they deserve any share from the booty or not?" He replied: "It is up to the Imām whether to give them a

share or to punish them.” Mu‘āwiya narrated to me from [Abū Ishāq] al- Fazārī that he said: “I asked al-Awzā‘ī: ‘A man went from the Territory of Islam to the Territory of War without the Imām’s permission and raided the enemy and acquired booty, and he came with it [back to the Territory of Islam]. [What is the ruling concerning him?]

’ He replied: ‘The one-fifth [share] should be taken from [the booty] and he deserves the rest.’” He [Abū Ishāq] said: “I asked [al-Awzā‘ī]: ‘How about if an enemy person embraces Islam and then raids the enemy and acquires property, and he brings it [to the Muslims]?’ He replied: ‘It is for him [to take] after taking out the one-fifth [share].’”

Al-Thawrī was asked about [the previous case], concerning the one who leaves the Territory of Islam and raids [the enemy] alone without permission, and about the captive who acquires a property from the enemy and brings it [to the Muslims]. He replied: “In all of [these cases], the one-fifth [share] should be taken [from the booty] and the rest should be given to him.” (Narrated to me from Mu‘āwiya from [Abū Ishāq] al- Fazārī from him.)

Al-Shāfi‘ī said: “We dislike it if a few [combatants] leave to face many [enemy combatants] without the Imām’s permission because of the risk [involved in such action]. But if they do [leave to fight the enemy], then the way that what they acquire without the Imām’s permission should be treated should be similar to what they acquire with the Imām’s permission. And if we assume that whoever leaves [to fight the enemy] without the Imām’s permission [and acquires booty] is a kind of thief, then we should assume that if armies leave [to fight] without the Imām’s permission, they would be considered thieves, and that if the people in a Muslim fortress are called upon to fight [the enemy] and they leave without the

Imām's permission, they would also be considered thieves." (Narrated to us from al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If a man or two men go from one of the cities in Syria or a different area and enter the Territory of War and acquire booty, whatever they acquire is theirs, and the one-fifth [share] should not be taken [from the booty] nor should the city's people receive a share with them.¹⁴⁴ And if one of these two men acquires a concubine from the enemy people, and he already has entered the Territory of War without a pledge of security, she is his. But he may not have sexual intercourse with her until he takes her out to the Territory of Islam. And the concubine should not given as part of the one-fifth [share] (in one of the two opinions). And if a [Muslim] army enters the Territory of War, and the two men enter [alone] and acquire booty and then the army reaches them, the booty should be divided up between them [the two men] and the army. The one-fifth [share] should be taken out [from the booty] and the rest should be divided up among them." They [Abū Ḥanīfa and his companions] also said: "If two men or one man leaves a Muslim army in the Territory of War and he acquires booty, whether he leaves the army with the Imām's command or without, his acquired booty should be divided up between him and the army combatants. The Imām should take out the one-fifth [share] and divide up the rest among them." (This is al-Lu'lu'ī's narration from them.)

Abū Thawr's opinion, concerning this case, is similar to al-Shāfi'ī's.

All of those [jurists] that we have named and whose opinions we have described said: "If an army enters enemy territory without the Imām's permission, and they acquire booty then leave [the enemy territory], the Imām should take out

the one-fifth [share] and divide up the [remaining] four-fifths among the army [combatants].”

Al-Ḥasan al-Baṣrī said: “If a detachment leaves to [fight the enemy] without the Imām’s permission, whatever [the detachment] acquires should be divided up among the Muslims. But if it leaves with the Imām’s permission, the detachment’s spoils of war should be given to its [combatants] after taking out the one-fifth [share]. (Narrated to us by Abū Kurayb saying: “Narrated to us by Wakī’ from Sufyān from Hishām from al-Ḥasan.”)

All of those whose opinions we described said: “Four-fifths of the booty should be for those who fight to get it.”

[Section 25]

They [Muslim jurists] agreed unanimously that a horseman should be awarded more from the booty than a foot soldier.

[Section 25.1]

They disagreed on the exact additional amount that the horseman deserves over the foot soldier.

Mālik said: "I have always heard that the horse receives two shares and the rider one share."¹⁴⁵ (Narrated to me by Yūnus from Ibn Wahb from him.)

Al-Awzā'ī said: "The Messenger of God gave the horseman two shares for the horse and one share for its owner (rider). Muslims after [the time] of God's Messenger have applied [this rule] until this day without any disagreement." (Narrated to me by al-'Abbās from his father from him.)

Al-Thawrī said: "A horseman should be given three shares." (Narrated to us from Abū Kurayb who said: "Narrated to us from Wakī' from him.")

Al-Shāfi'ī said something similar. (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa said: "A horseman should be given two shares, one for him and the other for his horse, and it should not be increased to more than that. And the foot soldier should be given one share for himself." This is the opinion of Zufar and al-Lu'lu'ī. Abū Yūsuf said: "The horseman should be given three shares, one for him and two for his horse."

Abū Thawr said [concerning] this issue an opinion similar to that of Mālik.

[Section 26]

They [Muslim jurists] agreed unanimously that whoever fights riding [one of] the pure Arabian horses should be considered a horseman deserving a horseman's share.

[Section 26.1]

They disagreed on [the share] of the one who fights riding [one of] the jades, hackneys, or others [that are not fit for use in combat].

Mālik was asked about the share of hackneys. He replied: "I see that hackneys are among the horses. [Pure] horses cannot provide for a large army. Thus, if the Muslim provincial leader permits [the use] of hackneys [in war], I think that they should have the same share as [pure] horses." (Narrated to me by Yūnus from Ashhab from him.) Yūnus narrated to me from Ibn Wahb that he said: "Mālik told me: 'I think that hackneys and jades are considered only to be among the horses if the Imām permits [their use in the combat]. This is because God said, "And (He has created) horses, mules, and donkeys for you to ride and as adornments." Therefore, the hackneys and the jades should be considered to be from among the horses [by giving them the same share].'"

Al-Awzā'ī said: "Muslim Imāms hitherto, until the rebellion (*fitna*) had grown stronger after the murder of al-Walīd, did not give any share for hackneys."¹⁴⁶ (Narrated to me by al-'Abbās from his father from him.) Mu'āwiya narrated to me from Abu Ishaq that he said: "Al-Awzā'ī said: 'Any jades that are similar to [pure Arabian] horses should be included with them [in the share], and any impure horses that are similar to jades should be given one share for him [the

rider] and another share for his horse. As for the hackneys and those dedicated for breeding offspring, there should be no share for any of them [if used in war].”

Al-Thawrī said: “There is no share for a mule, donkey, or a camel if a man rides on it [during combat].” (Narrated to me by ‘Alī from Zayd from him.) Abū Kurayb narrated to me saying: “Wakī’ narrated to us saying that Sufyān [al-Thawrī] said: ‘The shares of [pure Arabian] horses and hackneys are the same.’”

Al-Shāfi‘ī said: “Our opinion regarding this [question] is [that there should be an] equal [share] for [pure] Arabian horses, hackneys, and horses that are a half-blood race born of stallions with no Arabian breed” (Narrated to us by al-Rabī’ from him.) He (al-Shāfi‘ī) also said: “[The Imām] should consider the kind of horses [used in combat] and he should not enter [onto the battlefield] any except strong ones. He should not enter a horse that has an illness in its legs or a very weak one. But if he misses [examining all of them] and a man testifies that he has ridden on one of these [unfit horses], it is said [by jurists] that [the horse] deserves no share because any such [horses] do not give support [in battle] like the [strong] horses to whom God’s messenger gave a share. We do not have any knowledge that he [the Prophet] gave a share to anyone [during his time] based on [the use of such unfit horses]. He [al-Shāfi‘ī] said: “If a man says: ‘I will give a share to [such] a horse that is equal to the share of [its] rider,’ and then the horse does not [perform well] in combat, it is doubtful [that the horse deserves a share].” (Narrated to us by al-Rabī’ from him.)

Abū Ḥanīfa and his companions said: “A hackney is of the same level [in terms of its share] as the [pure Arabian] horse. The rider of a hackney should be given the same share as the rider of a [pure Arabian] horse. But if he rides a mule

or a donkey, he should only receive the share of a foot soldier. He should not receive more than one share for himself whether he fights riding a mule or a donkey, or remains as [a foot soldier]. ([Narrated by] al-Juzajānī from Muḥammad [al-Shaybānī].)

Abū Thawr said: "A jade's rider should receive the same share as the rider of a [pure] Arabian horse."

[Section 27]

They [Muslim jurists] agreed unanimously that if a horseman has with him other horses in enemy territory, he should receive a share for himself and [a share] for one of his horses.

[Section 27.1]

They disagreed on the share of more than one [horse].

Mālik was asked: "What do you think about a man who raids [the enemy] having two horses? Do both of them deserve a share?" He replied: "No, the share should be given only to one horse." (Narrated to me by Yūnus from Ashhab from him.)

Al-Awzā'ī said: "The one who raids [the enemy] having two horses should receive two shares and he should not receive more than that. [This is] a tradition well-known among jurists, and Muslim Imāms have applied it." (Narrated to me by al-'Abbās from his father from him.) Mu'āwiya narrated to me from Abū Ishāq that he said: "Al-Awzā'ī said: 'There should not be a share for more than two horses. The two horses' rider should receive five shares, even if he does not fight riding both of them as long as he has them during the raid.'"

Al-Thawrī said: "If a man raids [the enemy] having two horses, he will be given five shares. There should not be any share for more horses than that." (Narrated to me by Mu'āwiya from Abū Ishāq from him.)

Al-Shāfi'ī's opinion concerning this [question] is similar to that of Mālik. (Narrated to us from al-Rabī' from him.)

Abū Ḥanīfa, Zufar, and al-Lu'lu'ī said: "If a horseman has two, three, or more horses with him, he should only get two shares: one share for himself and another share for one horse. There should be no more [shares] than that." Abū Yūsuf said: "If he has two or three horses, or two or three hackneys, he should be given five shares, one share for himself and four shares for two horses or two hackneys that are with him. He should not get a share more than that. And whatever exceeds this amount is considered not ridden."

Abū Thawr's opinion concerning this [question] is similar to that of Mālik. He [Abū Thawr] said: "We are not aware of jurists giving shares to someone who has ten animals to use for riding and carrying goods and who might use them for transportation."¹⁴⁷

Sulaymān b. Mūsā said: "If a man takes with him on the way [to battle] several horses, each horse should be assigned two shares." (Narrated to me by al-Ḥasan b. Yahyā saying: "Abd al-Razzāq narrated from Ibn Jurayj from him.")

[Section 28]

They [Muslim jurists] agreed unanimously that whoever fights riding his horse until the booty is collected, then his mount or horse dies (or becomes weak), he should receive the share of a horseman.

[Section 28.1]

They disagreed on [the case of] the one whose horse dies (or becomes weak) before [collecting the booty].

Mālik was asked about [the case of] a man who leaves for the Byzantines' land then dies without participating in combat: "Should he receive his share?" He replied: "I do not think so." He was asked: "Is the [case] of the horse the same?" He replied: "Yes, if the man [does not receive a share], how can the horse?" (Narrated to me from Yūnus from Ashhab from him.) Mālik was asked about [the case of] a horse that is used for raiding in the Byzantine land, and it becomes weak because of flipping over a stone, [and remains that way] until the end of the combat. "Should [this horse] receive any share?" He replied: "[The horse] should not receive any share. How can there be any share for it when it has a broken leg?" The inquirer asked: "But the horse has entered enemy territory!" He replied: "I do not think there should be any share for it. It might enter enemy territory and then get a broken leg."

Al-Awzā'ī was asked: "If a man's horse becomes weak after he has entered [Byzantine territory] before [acquiring] the booty, and his horse is kept with those who follow [the main army], [what will be his share?]" He [al-Awzā'ī]

replied: "His horse will not receive any share." Someone asked him: "How about a man who raids [the enemy] riding a weak horse because he does not have any other horse, but it is [in general] a good horse [for combat]?" He replied: "If he raids with [the horse], there should be a share for it."

Al-Shāfi'ī said: "As long as he [the Muslim combatant] does not participate in the combat as a horseman, his horse which he has led to enemy territory and which then dies before combat has started should not receive any [share]. And if he comes with horses and fights riding each one of them for an hour, he should not receive a share except for one horse. And if a man has a horse and he fights riding it for an hour, then it is given to another man among the foot soldiers, and the latter fights riding the horse, then [it is given] to another man who fights riding it, [then] the share of the horseman should not be given except to the horse's owner, and the foot soldiers [who have fought riding the horse] should receive only the share of a foot soldier." He [al-Shāfi'ī] also said: "If we divide among them the horse's share, we should not increase it to more than the share of one horse, similar to [the case of] giving a share to a man who has died. His heirs should not receive more than one share, and if a group of people [among the heirs] deserves [a specific amount] from his share, they should divide it up among themselves." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa, Zufar, and Abū Yūsuf said: "We look into [the share] of the horseman and the foot soldier according to what is [written] in the register (*dīwān*)¹⁴⁸ when they enter enemy territory. Thus, if someone has a horse registered for him, and he enters enemy territory riding a horse, he should receive the share of a horseman; whether or not afterward his horse becomes weak, or he

sells his horse, loans the horse [to someone], or rents it out, he should receive from the booty a horseman's share. And for the one who is registered as a foot soldier and enters enemy territory as a foot soldier, then the [army] acquires booty, he should only be assigned the share of a foot soldier, not more than that. And if he [the foot soldier] captures a horse or hackney, buys one, receives one as a gift, borrows [one], or rents it after he has entered enemy territory, and he fights riding it until the [army] collects the booty, he should only be assigned a foot soldier's share based on the [status] in which he entered [enemy territory]."

Al-Lu'lu'ī said: "If he enters [enemy territory] with a [pure Arabian] horse or a hackney and it becomes weak, is stolen, escapes away, or is taken by polytheists before the Muslims acquire any booty, then afterward they acquire booty and he [fights] among them as a foot soldier, he should be assigned a horseman's share. But if he sells his horse, gives it away as a gift, rents it, or lends it, then the people acquire booty and he [fights] among them as a foot soldier, he should only be assigned a foot soldier's share. And if he enters [enemy territory] as a foot soldier then buys a horse or is given one as a gift before the army combatants acquire any booty, and he fights among them [as a horseman] until they acquire booty, he should be assigned a horseman's share. Also, if he rents a horse or borrows it and fights riding it until the [army] collects the booty, he should be assigned a horseman's share."

[Section 28.2]

They disagreed on [the case of] sea raiders who travel in ships and some of them have horses while others are foot soldiers, similarly to their disagreement on [the case of] land raiders.

[Section 29]

They [Muslim jurists] agreed unanimously that whatever shares an on-land horseman receives are the same as a horseman in a sea [raid], and whatever a foot soldier receives on land, he receives [the same] in a sea [raid].

[Section 30]

They [Muslim jurists] agreed unanimously that raiders may eat from the food of the enemy, and they may use the [enemy people's] fodder to feed their animals.

[Section 30.1]

They disagreed on [the case] of [the raider] who carries the [food or fodder] to the Territory of Islam or sells some of it, and on what is lawful to eat and to benefit from that [the rest of] army combatants do not benefit from.

Mālik said: "We still hear that food in enemy territory may be taken. A man may take [food] and there is no harm if he eats it without asking for permission from the authorities. If the food is not eaten until it is collected and the people then get only from the portioned division among them, the people will die." He [Mālik] also said: "I think that sheep, camels, and cows are considered food [in enemy territory]. They may be eaten similarly to any other kind of food. If such [an animal] is not allowed to be eaten until the people gather together and the booties are collected and divided among the people, it will hurt the army and the [combatants] will die. Therefore, I do not see any harm in eating [the meat of such animals] based on need. I do not approve of anyone saving anything from [such animals], so he should not acquire them as property for himself." He [Mālik] [was asked] about [the case of] a man who raids [the enemy] and acquires food, and he eats from it and saves what remains: "May he keep [this food] and eat it later with his family or sell it before coming back to his country and benefit from its value?" He replied: "As for selling it during the military expedition, it is my opinion that its monetary value should be put with the Muslim booties. But if

he reaches his country with [the food], I do not see any harm if he eats it and benefits from it if this food is taken for [the need of travel] and a portion remains with him when he comes back [to Muslim territory].” He [Mālik] said, concerning [the case of] the raider for the sake of God who gives his family as a gift the food that he acquires in enemy territory: “If it is a trivial thing, there is no harm in that.” (Narrated to me from Yūnus from Ibn Wahb from him.)

Yūnus narrated to me from Ashhab saying: “Mālik was asked about [the case of] people who capture food in the territory of the Byzantines. Some of them get honey, others wheat, and others meat. Then, they say to each other or each one to his companion: ‘Give us wheat and we will give you honey or other kinds of food different from the one [you] took from them.’ He [Mālik] replied: ‘I do not approve of [such dealing]. I see this as a sale. He sells the honey and gets wheat. Do you see that he could sell [the honey] to him and receive a bridle that he uses to ride [his horse]? This [transaction] is similar and therefore I do not approve of it. This is a sale and sale is not permitted for [captured food]. But [those people] may feed each other without having any condition. [Permitted] food in the land of the Byzantines is when someone eats what he finds, and if [some food] remains, he may give it to [people] in the army and he should not sell it.’”

Yūnus narrated to me from Ibn Wahb saying: “Mālik was asked about the raiders for the sake of God, whether in the sea or not, who reach enemy territory and acquire food. Some people get [a kind of food] that is not acquired by others. Some acquire meat and others bread and honey. Then, the people of one ship say: ‘We have acquired meat but did not get bread. Can we give you what we have and you give us [from what you have]?’ and if they do not give them anything, they

will not get anything from them either. He [Mālik] replied: 'I hope this is [only] a light thing if it is something edible.'¹⁴⁹ 'I [Ibn Wahb] asked him: 'How about a man who finds wheat and another man finds barley and the former needs barley for his horse, so he asks the latter to exchange [the wheat] with the barley?' Mālik replied: 'If this [happens] during a raid, and if it is something light that they can eat and use to keep their strength, I do not see any harm in [doing] that.'"

Al-Awzā'ī said: "Muslims used to leave the Territory of War with the remainder of fodder and food to the Territory of Islam and they foddered their animals with it, and they used to come back to their families with dried meat and some of them would give it to others as a gift. No Imām should dislike [this action] and no scholar should object. And if any of them sells any [of this food of fodder] before the distribution of the booties, its value should be added to the collected booty. But if he sells it after the booties are divided, he should spend its value on behalf of the army as a charity." (Narrated to me by al-'Abbās from his father from him.) He [the father of al-'Abbās] said: "He [al-Awzā'ī] was asked about [the case of] a man who takes out wheat from enemy territory and plants it on a farm. He [al-Awzā'ī] replied: 'There is no harm in it even if he eats from it or gives it as a gift unless he sells it. If he sells [the wheat], it would not be the right thing to do.' I [the father of al-'Abbās] asked: 'What if he wants to expiate himself from the sin [of selling the wheat]?' He replied: 'He should pay the value of the wheat that he has taken out from enemy territory, then he may sell and do [with it] whatever he wants.' 'I asked: '[Should he pay] its value in enemy territory or its value in his country?' He replied: 'Its value in his country.'"

He [the father of al-‘Abbās] said: “Al-Awzā‘ī told us that ‘there is no harm in the food that Muslims take out from enemy territory.’ He [al-Awzā‘ī] said: ‘They used to take out dried meat and cheese if it was for eating or as a gift. But as for selling, it would not be the right thing to do.’” Mu‘āwiya narrated to me from Abū Ishāq saying: “I asked al-Awzā‘ī about the food, drink, seasoning, or fodder that we acquire in the land of the Byzantines. He replied: ‘It is for the one who gets it first. He may take it, and he should not include it with the collected booty even if it has a [monetary] value.’ I [Abū Ishāq] asked: ‘Should he ask for permission from the Imām if it is a small amount?’ He replied: ‘No, unless the Imām forbids taking [the food], then [in this case] no one should take anything from it without his permission.’ I [Abū Ishāq] asked: ‘May the Imām forbid taking it?’ He replied: ‘If the food is a small amount and he [the Imām] wants to make the people share [the food] out of his caring for them, there is no harm if he divides it among them.’ I [Abū Ishāq] asked: ‘May the Imām sell the food in enemy territory?’ He replied: ‘He should not sell it in enemy territory and should refrain from taking it, and if a person sells some of it, it should be considered to be [part] of the booty.’ I [Abū Ishāq] asked: ‘May he [the Imām] sell anything from [acquired] cows and sheep if he wants?’ He replied: ‘He might sell some before if they are beyond the people’s need [for food]; there is no harm if he sells it to those who drive [the animals]. As for the food, it should not [be sold].’ I [Abū Ishāq] asked: ‘Shall the Imām address the people, saying that we have permitted for you the food, fodder, cows, and sheep [in enemy territory]?’ He replied: ‘The Imām should not do this and address the people, because it is already permitted for them [to eat them].’ I [Abū Ishāq] asked: ‘How about the

one who acquires food or fodder and loads his mount with it. Is he the one who has the right to get it?' He replied: 'The one who gets it first has the right to it, but it is morally commendable not to deprive his brother when the latter needs [food or fodder].' I [Abū Ishāq] asked: 'And is whatever he gives away [from the food or fodder] considered to be similar to the food that he gains for himself?' He [al-Awzā'ī] replied: 'No, that is more [needed].' I [Abū Ishāq] asked: 'Does he commit a sin if he deprives [another Muslim] from [the food and fodder] because he is saving the food [for a special need], but at the same time [his companion] is in dire need?' He replied: 'No, there is no sin committed. People resided in Constantinople and they cultivated the land, and they had only to pay one-tenth [of the harvest].'¹⁵⁰ I [Abū Ishāq] said: 'What do you think if they drive a herd, and then the saved food is finished and they are hungry? May they slaughter from [the herd's animals] and eat [the meat]?' He [al-Awzā'ī] said: 'If they do that in enemy territory and slaughter [the animals] and eat, it should be considered to be similar to the food [they eat from non-herded animals]. But if they do that after they pass the way through [to Muslim territory], those who have slaughtered [from the herd's animals] should pay the one-fifth [share], counted from their shares.'"

He [Abū Ishāq] said: "I asked him [al-Awzā'ī]: 'How about [the case of] a man who acquires barley and another person acquires wheat and he exchanges one with the other? Do you think that this is [considered] a sale?' He replied: 'No.' Someone asked him: 'How about a man who acquires food or fodder: may he buy with it dates from a man who takes [dates] out from his family's [home]?' He replied: 'There is no harm [in doing that].' I [Abū Ishāq] asked: 'May he buy

with [the food or fodder] [another] kind of food or seasoning?' He replied: 'There is no harm [in doing that]. He is [only] exchanging food with food and all of it is edible.' I [Abū Ishāq] asked: 'May he sell what he has exchanged afterward?' He replied: 'No.' Someone asked him [al-Awzā'ī]: 'A man takes a loan of wheat or barley [with the value of] one *dāniq*¹⁵¹ from another man. Then, they enter enemy territory. The borrower acquires some of the enemy's food and repays his loan [or some of it] from [that food], and the lender accepts [the payment]. [Is this permissible?]' He replied: 'The borrower should pay the value of the food [with which he paid his loan], and he should put [the payment] with the collected booty because it became like a sale when he paid [the loan] back.' I [Abū Ishāq] asked: 'Should the lender give to the borrower what the latter owed, saying: 'You gave me the loan back from what I had a share in it'? He [al-Awzā'ī] replied: 'He [the lender] should return [the loan] back to the [borrower] because the latter [already] submitted its value to be [added to] the collected booty.' I [Abū Ishāq] asked: 'What do you think about the non-combatant [army] workers and others who do not get any share with the Muslim [combatants]? Is it lawful for them to eat food [acquired] in enemy territory?' He replied: 'Yes.' Someone asked him about [the case] of a man whose job it is to secure the [swords'] leather cases or to do other kinds of work [for the army]. A man brings him food from what he acquires among enemy food. He replied: 'He [the worker] should not take the food from him.' I [Abū Ishāq] asked: 'If the Imām comes to Byzantine cities and a man brings him the best of their food as a privilege dedicated [to the Imām], should he [the Imām] eat from it when he [already] owns a share with [the Muslims] in this food? He replied: 'I do not prefer for him or the one who brings him the food [to

do so]. I [Abū Ishāq] asked: 'Do you dislike for the one who is present [with the Imām] to eat from [the food presented to the Imām]?' He replied: 'Yes, there is something [wrong] in doing this'. I [Abū Ishāq] asked: 'How about if a man borrows barley from another and the latter has acquired it in enemy territory?' He replied: 'He should pay the loan back to him, and if he does not pay it back until he returns to the Territory of Islam, he should not pay it back [in the Territory of Islam].'"

Someone asked al-Thawrī: "What do you think about the food and fodder [acquired by Muslims] in Byzantine territory?" He replied: "They may eat and fodder [their animals] during their travel. And if any of them has an extra amount and he comes back with it, he should give it to the Imām." (Narrated to me by Mu'āwiya from Abū Ishāq from him.) He [Abū Ishāq] said: "I asked him [al-Thawrī]: 'What if the Imām refuses to accept [the food or fodder] from him or he is unable to give it to the Imām? Will he fulfill his religious duty if he sells it and gives away [its value] as a charity?' He replied: 'I hope so.' Someone asked him [al-Thawrī]: 'What do you think about [the case of] a man who acquires food or fodder, then he dies and some of the food or fodder remains? Should this [remaining food or fodder] be sold with his inheritance?' He replied: 'No, if it is sold, it becomes booty, but his companions may divide [the remaining food or fodder] among themselves and help each other with the means of sustenance.' I [Abū Ishāq] asked: 'What do you think if the Imām forbids [the Muslims] to take from the herd and the food so that he can divide them among the people, and a person takes something without his permission? Is that considered to be unlawful gain of spoils of war (*ghulūl*)?' He replied: 'This is a lesser [infringement on the

rules regarding the booty, but the Imām should admonish him and fine him its value if he has already consumed it, or [if not consumed,] it should be calculated from his share that he [the Imām] wants to give him.' I [Abū Ishāq] asked: 'What do you think if a person sells food [taken from enemy territory] to another and leaves, then he is told: "What you have done is deplorable"? Should he return the [food's] value to his companion [the buyer] if the food has not yet been consumed? Or should he put the value in the collected booty?' He replied: 'He should put the value in the collected booty.' I [Abū Ishāq] asked: 'What if he has not received its value yet?' He replied: 'He should not take it from him [the buyer].' I [Abū Ishāq] asked: 'May he get the food back if he wants?' He replied: 'I do not think he should take it from him, because he has already sold it and he is not in need of it.' I [Abū Ishāq] asked: 'If we are in enemy territory and the time for the Feast of Sacrifice [*aḍḥā*] arrives, should we sacrifice [animals] if we want?' He replied: 'Yes, one sheep [for each person]. Muslims used to sacrifice [animals] in the territory of their enemies.' I [Abū Ishāq] asked: 'Should the one who offers the sacrifice say to the Imām: "I give you the price for this [animal] so that I can sacrifice it"?' He replied: 'No, he should not tell him that, and he may offer the sacrifice if he wants.'" He [Abū Ishāq] said: "Sufyān [al-Thawrī] disliked it if they did not eat [the sacrificed animal]. He said: 'I do not like mischief.'"¹⁵²

Al-Shāfi'ī said: "It is not permitted for anyone from the army to take anything [for himself] excluding [the rest of] the army from among the properties of the enemy except food in particular. All [kinds of] food are the same, and this refers to all [kinds of] drinks too. Anyone from [the army] who acquires

something [of food or drink] may eat it and drink it, use it to fodder [his animal], or feed it and give it as a drink or as fodder to another person. But he may not sell it, and if he sells it, he should return its value to the booty. He may also eat it without the Imām's permission. And whatever is permitted from food or drink, the Imām does not have any say in it." He [al-Shāfi'ī] said: 'If a man gives a loan of food or fodder to another in enemy territory, the latter should repay it to him. But if he leaves enemy territory, he should not be [obliged] to repay it to him, because he is permitted to eat it in enemy territory, but he is not permitted to eat it if he leaves enemy territory. And the borrower should pay it back to the Imām instead.' He [al-Shāfi'ī] said: "Anyone who has extra food with him, whether a small amount or large, and he leaves the Territory of War with it, he is not permitted to eat it or sell it. He should return it to the Imām so that it becomes [part of] the booty. And if he does not do so until the army is dispersed, he does not get himself out of [the religious responsibility] if he gives it away as a charity, not even [giving away] multiples of it. And he does not get himself out of the responsibility toward the right of an individual or a group [of army combatants] unless he pays it to them. And if he says: 'I cannot find them,' he can [definitely] find the great Imām who can distribute it among them. I do not know any reason [to accept] the opinion of the one who says: 'He should give it away as a charity.' If it is his property, he should not have to pay it as charity, and if it is the property of another person, he should not have [the right] to donate the other's property. And if he says: 'I do not know them,' one should tell him, 'You know the provincial authority (*wālī*) who is responsible for managing their [affairs]. And even if you do not know them and their leader, you can only fulfill [the religious

responsibility] between you and God by paying back their property, whether it be a little or a large amount.’ And if two men sell to each other as an exchange food for food in enemy territory, the analogy (*qiyās*) infers that there is no harm in such a [transaction], because he takes a permitted [property] in exchange for a permitted one. And each one of [the two persons] may eat what he gains unless he leaves [enemy territory]. If he leaves, he should return the excess amount. The reason [for this permission] is that if [a Muslim] is permitted to take food [while in enemy territory] and feed another person with it, then because the latter is permitted to take [the food] similarly to the former, there is no harm if he exchanges [food] with him [in a sale contract].”

He [al-Shāfi‘ī] said: “If a man has in his hand an excess of food in enemy territory after the war has ended, and then a man, who came from [the Territory of Islam] and did not share the booty with them [the army], exchanges [food] with him in a sale contract, his sale is not permitted because he has given [the food] to a person who is not [qualified] to eat it. So the sale is invalid. And if the sale has already happened, he [the one who has the excess of food] should return its value to the Imām, and he does not have [the right] to keep [the value], because he took [the food] out of his hand and gave it to a person who was not permitted to eat from it. And it is the same as taking out [food] from enemy territory to a place [in the Territory of Islam] where he is not permitted to eat from it.” He [al-Shāfi‘ī] said: “I prefer that if they [Muslim combatants] are not overcome [by the enemy] nor afraid that they might be overcome in enemy territory, or if they are not in a desperate situation, they should slaughter a sheep, a camel, or a cow only for eating [its meat]. They should not slaughter [such an animal] for making sandals,

sandal straps, or a water container made from their skin. If they do so, I would dislike [such an action] and I would not permit them to make anything from their skin.” (Narrated to us by al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “If a man takes from the booty food or fodder in an amount exceeding what he and his animal need, he should return this extra amount to the booty. And if the booty has been already distributed, he should give it away as charity. And if he loans some of it to a person from the army in the Territory of War, he should not take it back from him, because the [latter] has the [right] to take from the booty the food and fodder that he needs. And if the [former] gives [the latter] a loan from the excess amount in his hand [taken from the booty], it is the same as what the borrower can take [from the booty], and the one who lends him [the food] should not take back anything. And if he [the lender] wants to recover something [from the loan] and he asks for a judicial arbitration, he [the lender] should not get a judgment in his favor against the borrower. And if he [the one who has an excess of booty] sells anything [that is food or fodder] to one of the Muslims in the Territory of War and the latter was in need of it, his sale is invalid and he may not get a judgment [by a judge] to recover the value [of what he sold]. And the one who buys it may eat from it and fodder his animal. And the buyer should not be given the price back of what he bought. And if he sells [the extra food or fodder] or lends it after he departs for the Territory of Islam, he should pay its value or its equivalent back to the booty. And if the booty has been already divided, he should pay it as a charity to the poor among Muslims, and nothing of it is lawful for him [to consume].”

Abū Thawr said: "If a man takes fodder, meat, or some seasoning from the Territory of War and he leaves with an excess amount, there are two opinions [concerning such a case]: First, the [fodder, meat, or seasoning] should be his, because if they [jurists] permit him to take it while he is in the Territory of War, the permission should also be given if he leaves [the Territory of War], and God knows best. The second opinion is that the [fodder, meat, or seasoning] should be his as long as he is in the Territory of War, and if he leaves he should return it back to the booty. The first opinion is more in line with analogy (*qiyās*), which is what I hold, and the second [opinion] is the more cautious one. And God knows best."

[Section 31]

They [Muslim jurists] agreed unanimously that it is forbidden for [any] of the army [combatants], if he enters enemy territory, to take for himself something from the enemy properties that they own, such as gold and silver, without the rest [of the army], and that whoever takes such [a property] should put it with the collected booty.

[Section 31.1]

They disagreed on [taking] properties other [than gold and silver] following their unanimous agreement that he may take food for himself for consumption in the way mentioned before.

Mālik was asked: “We acquire in Byzantine territory peppers and cinnamon. Do you see it as food of the kind that you permit the one who acquires it to eat?” He replied: “Yes, he may eat it.” (Narrated to me by Yūnus from Ashhab from him.) He [Mālik] was asked about [the case of] a man who takes from the trees, in Byzantine territory, glues, medicines, reeds for bows, and sticks shaped as [arrows]: “May he leave with some of this to his country?” He replied: “As for the light thing that is not intended for sale, there is no harm. But for anything that is intended to be sold, I do not like it and I do not think that [it is valid].” Someone asked him: “What do you think about [the case of] a raider who finds a sack in which he needs to put his goods, leather from which to have a shoe made, and plants (*shīḥ*)¹⁵³ as medicine for abdominal [pain]?” He replied: “I do not see any harm if they take [such commodities], and [denying their use] would make things difficult for people. During a raid, not everyone has what is enough

for his needs.” Someone asked him: “One of them [Muslim combatants] brings a ball of thread that he buys with one *dāniq*, and he puts it with the collected booty. [What do you think about this case?]” He replied: “They are showing off with this [act]. Why make things difficult for people?”

Yūnus narrated to me from Ibn Wahb saying: “Mālik was asked about [the case of] a man who takes something from enemy territory during a raid, such as stone, a marble, a stone for sharpening spear-heads, a walking stick, or medicine from trees. He replied: ‘As for the stick that he is using [for walking] and the medicine that is taken from trees, I do not see any harm in [doing that]. As for the marble and the sharpening stone, there is doubt about [taking] them, because without having a group of people with him he would not be able to collect these things. And then he may bring them with him [to the Territory of Islam] and sell them. [That is why] I do not like [such an action].’ I [Ibn Wahb] asked him: ‘[How about] the medicine that you mentioned?’ He replied: ‘There are medicines that have been brought from there, which are [extracted] from trees. There is no harm [in bringing such medicine].’” He [Ibn Wahb] said: “He [Mālik] was asked about the sheep and goats that raiders slaughter in Byzantine territory: ‘What do you think of their skin? Should [the skin] be put with the booties even if it has no value?’ [He replied]: ‘I do not see any harm in taking it [for themselves].’ He was asked: ‘How about the things a man needs from which he benefits, such as a saddle’s pad, a belt, a shoe, a saddle, or the saddle’s crupper, and they [the combatants] need these [items] for their benefit?’ He replied: ‘I do not see any harm if they benefit from all [such things], and I see that as a wide open [choice]

for the one who takes it, as long as he does not take it and carry it to his family and receive a compensation for it.”

Al-Awzā'ī was asked about the firewood that a man collects in Byzantine land [or] the weed that he cuts: “May he sell it? And what he should do with its value?” He replied: “If he sells it, he receives its value and there is no one-fifth [share] taken from it.” (Narrated to us by al-'Abbās from his father from him.)

Mu'āwiya narrated to me from Abū Ishāq that he said: “I asked al-Awzā'ī: ‘What do you think about [the case of] the hunted animal or the sea catch, which the enemy do not have in their homes, and a [Muslim] man acquires it while he is with the army?’ He replied: ‘It is for him and not for the army. He may sell it if he wants. There is no harm on him in doing that.’ He also said: ‘And any whales the sea pushes away and are found on the shore or found in the nets in the water, or any salted fish that are found in their homes, all this is food that should not be sold. And if anything from it is sold, it should be [considered] booty.’ I [Abū Ishāq] asked: ‘What if they acquire a male gazelle or hunt an animal, a pigeon, or a domesticated bird in their homes?’ He replied: ‘This is food that can be eaten and should not be sold.’ I asked: ‘What if the Imām thought that they could sell what they acquire from the above, as a good gesture to them because it has value and they do not need food?’ He replied: ‘This is for him [the Imām] [to decide] if he wants. And if he leaves [what is acquired] for the people to take from, anyone who wants to eat from it may do so.’ I asked: ‘How about fenugreek [herb]?’ He replied: ‘It is of the [category of] food and fodder.’ He also said: ‘Honey, cheese, animal butter, vinegar, and seasoning are all food and should not be sold.’ I asked: ‘How about onion?’ He replied: ‘It is food.’ I asked: ‘How about salt?’ He

replied: 'Food.' I asked: 'How about pepper and spice?' He replied: 'They are food and should not be sold.' I [Abū Ishāq] asked him later about them and he replied: 'They may be sold.'"¹⁵⁴

Al-Thawrī said: "Spice is a [kind of] food and may be consumed." (Narrated to me by Mu'āwiya from Abū Ishāq from him.) It was narrated to me from Mu'āwiya from [Abū Ishāq] al-Fazārī that he said: "I asked Sufyān [al-Thawrī]: 'What if a man hunts a male gazelle while he is with the army, and then brings it here and sells it?' He replied: 'There is no harm [in doing that]. It is for him. This is not like that, meaning not like food and fodder, because this not for them [the combatants] [to share].' I asked: 'What do you think about oil: is it permissible to use?' He replied: 'Yes, it is food.' I asked: 'How about the oil used as ointment?' He replied: 'No, it is not food.' He also said: '*Mistika* gum, *ihlilaj* fruit, black seed, cinnamon, incenses, and ginger that is not mixed with honey, all of these may be sold [because] they are not [considered] food.' He also said: 'Chickpeas, mustard, the fruit of the terebinth tree, *al-harq*, garlic, and sumac are all [considered] food. Also, *barnī* honey is [considered] food, and if anything from it is sold, it should be [considered] booty.' I [Abū Ishāq] asked: 'What do you think about medicines and eyeliners?' He replied: 'They may be sold.' I asked: 'How about the seeds of beans, the grafts of trees, and sweet basil?' He replied: 'They may be sold.' I asked: 'How about the wax that he acquires? May he use it for his saddle?' He replied: 'No.' I asked: 'How about the tar that a man uses to harden his mount's hoofs?' He replied: 'If it has a value, then he should not [use it], but if it has no value, I prefer that he makes it lawful by [giving] something.' I asked: 'How about naphtha?' He replied: 'The same.' He [al-

Thawrī] was asked: ‘How about the soap that a man uses to wash his shirt?’ He replied: ‘No, it should be put with the collected booty.’ He also said: ‘The frankincense should be put with the collected booty.’ He was asked: ‘How about the *khatmī* dissolvent, the mud, and the washing fluid that they use to wash [their clothes]? He replied: ‘If it has no value, then there is no harm, but I prefer that he makes it lawful by [giving] something.’”

Al-Shāfi‘ī said: ‘If the people enter enemy territory and they acquire something other than food, the basic principle concerning what they acquire other than food is two [rules]: one of them is prohibited, and its acquisition is [considered] unlawful booty (*ghulūl*), while the other is permitted for the one who acquires it. The basic principle in knowing the permitted one is to look at the Territory of Islam: whatever is permitted in it, such as trees that are not owned by a human being or an [animal] hunted on land or caught in the sea, the acquisition of a similar thing in enemy territory is lawful for the one who acquires it. This includes a bow that a man cuts in the desert or on a mountain, a cup or whatever he wants carved from wood, and whatever stones he wants for sharpening and other things if these are not owned and [personally] acquired. All that is acquired from this is for the one who takes it, because in principle it is lawful and not owned. As for whatever those [enemy] people own and keep in their homes, it is forbidden, such as a stone they have brought to their homes, a stick or something else, or a hunted animal; taking such a thing is [considered] unlawful booty.” He [al-Shāfi‘ī] said: “And if a [person] takes a trained hawk, since this [animal] must be owned [by someone], he should return it to the collected booty. The same [rule] is applied if he hunts an animal that has a necklace, an earring, or a mark.

All such [animals] are known to have an owner. Similarly, if he finds in the desert a carved pole or a carved cup, the carving is proof that it has been owned and it should be made known [to the Muslims]. If the Muslims recognize it, then it is theirs. If they do not recognize it, it should be [considered] a booty because it has been [acquired] in enemy territory.” He [al-Shāfi‘ī] said: “Whatever enemy properties are found, everything that has a value, such as a cat, a hawk, or a dog, is [considered] booty. And whatever [a Muslim] acquires from pigs, if they are old enough to run, I would order him to put to death all of them, and they should not under any circumstance be put with the booty.” He also said: “Food is permitted to be eaten in their [enemy] territory and also drinks. And what we mean by what is edible is that which prevents hunger and thirst and is considered to be food in some of its uses. But as for all medicines, they are not counted as permitted food. Also, ginger, whether mixed with sweet-smelling material or not, is counted as medicine. As for ewes, they are [considered] food for consumption. Therefore, whatever is counted as food, the one who takes it may eat it, but he should not take it out from enemy territory, and whatever is counted as medicine, he may not take it [for himself] in enemy territory or [for] anyone else.” He [al-Shāfi‘ī] also said: “And the skins of animals that the enemy owns are similar to *dīnārs* and *dirhams*, because they [Muslims] are allowed to eat from their meat, but they are not allowed to save their skins and water containers, and they should return them to the booty.” He [al-Shāfi‘ī] also said: “And if the permission for [eating] the food is specified, there is no permission for [taking] the skin of cattle or a container that has food, because the container is not food and the skin is not meat. Therefore, he should return the container, the [animal] skin, or the string

with which he ties up his bag (*wikā'*), and if he has already used it, he is [responsible] for its value. And if he benefits from it, he is responsible for [paying] its equivalent until he returns it [in addition to] the amount of its decrease in value due to consumption, and [he must pay] the rent for such a commodity if such [a commodity] has any renting value." He [al-Shāfi'ī] said: "A [Muslim] man should neither load his animal nor put oil [taken from] enemy oils on its hair, and if he does that, he should return its value." (Narrated to us by al-Rabī' from him.)

[Section 31.2]

They disagreed on the permission to use what is acquired from enemy properties whose destruction is forbidden, in case there is a need to [give these properties] to some Muslims and not others.

Al-Awzā'ī was asked about [the case of] a man who takes a weapon from the booty if he needs it and who then fights with it without the Imām's permission. He replied: "He may fight with it if the people [Muslims] are in the midst of combat, then he should return it into their collected booty. He should not wait and not return it until the war has ended and subject [the weapon] to destruction and the breaking of its [sharp] edge because of its long use in enemy territory. The Messenger of God said: 'Be aware of avoiding usury caused by unlawful booty: [this is] when you ride an animal until it becomes disabled before it is given to the collected booty, or to wear a shirt until it becomes old before it is put with the booty.'" ¹⁵⁵ (Narrated to me by al-'Abbās from his father from him.)

He [the father of al-‘Abbās] said: “He [al-Awzā‘ī] was asked about [the case of] a man who carries something from the spoils of war and benefits from it, and he wants to reach [the place] where the collected booty is but loses it: ‘Does he have to pay its value or should he give [only] the value of the amount from which he has benefited when he reaches the [the gathering place of the booty]?’ He replied: ‘He should ask God for forgiveness and should not do that again, and he should put the equivalent of that from which he has benefited in the collected booties.’”

It was narrated to me by Mu‘āwiya from Abū Ishāq that he said: “I asked al-Awzā‘ī: ‘If a man’s horse is killed in combat, may he ride a horse [taken from] the spoils of war or should he fight [only] with a weapon or arrows and shoot with them?’ He replied: ‘If he is in the midst of combat and engagement, there is no harm if he does something like that.’ I asked: ‘Should the Imām give permission to take that [horse from the spoils of war]?’ He replied: ‘If he is in a state of necessity, he does not have to ask for permission from the Imām to do so because there is no harm on the one who is in a state of necessity. But during an attack on the enemy with lances, he should not take anything like that and the Imām should not give him permission to do so.’ I asked: ‘What if he rides the horse [taken from the spoils of war] in the midst [of combat] out of necessity, and it is killed while he is riding it? Should he be obliged to pay its value?’ He replied: ‘No.’ I asked: ‘Should he pursue the enemy while riding the horse when the [enemy] people have already retreated?’ He replied: ‘No.’ I asked: ‘Shouldn’t it be considered a necessity to pursue the enemy while riding it when they are retreating?’ He replied: ‘No, but he should stay at his post and should not put to death an animal

that belongs to Muslims to pursue [the enemy], because the people [Muslims] are pursuing them and they can save him from doing so, unless he fears that if he does not follow the people, he will die.' I asked: 'What if he is riding his own horse, but he takes a sword or a lance from the spoils of war? Should he fight with it while riding his horse?' He replied: 'There is no harm [in doing that]. This is not like the horse.' I asked: 'What if he takes a horse from the spoils of war that is stronger than his own horse or a sword that is sharper than his own sword and fights with it in the midst of combat?' He replied: 'There is no harm [in doing that].' I asked: 'May a man wear a shirt taken from the spoils of war because of cold [weather]?' He replied: 'It is reprehensible to do so, unless he fears death and wears [the shirt] because this is a necessity.' I asked: 'If a man acquires fodder while he is with a detachment and he does not have a container to put the fodder in, and he needs the fodder and is afraid that if he does not [have the container], he will be stranded, may he take a container from the spoils of war with him to the army [camp]?' He replied: 'This is a necessity . . .'"¹⁵⁶

" . . . Breaks the firewood with it¹⁵⁷ and then carries it and brings it to the army [camp] and he already has benefited from it?' He [al-Awzā'i] replied: 'Everything such as this and the like, if you take it and benefit from it, and you want to take it to the army [camp] from the detachment, you should not benefit from it unless out of necessity, because if you benefit from it and then bring it to the collected booty, you have already benefited from part of the spoils of war. And if you want to benefit from anything from that at your post, and then you drop it and do not carry it to the collected booty, there is no harm [in doing so].' I asked: 'What if I am not carrying it myself, and someone else from among my

companions carries it to the collected booty?' He replied: 'If this is the case, you should not benefit from it until you know that it will not be carried away and it will be left.' He [al-Awzā'ī] was asked: 'What if he carries it with him for a day or two, benefiting from it, then he drops it to avoid taking it to the collected booty and to avoid being [considered] as benefiting from part of the spoils of war?' He replied: 'I do not like for him to conspire to do such a thing.' He was also asked: 'How about a man who takes a male [horse] from the herd to ride on in order to drive the herd or pursue another herd to bring [to the Muslim combatants]?' He replied: 'Does not he have with him an animal?' It was said to him: 'Yes, but he is protecting his animal.' He [al-Awzā'ī] said: 'If he is doing that in order to look after the people in general, there is no harm in that. And if the Imām is present, he should ask him for permission.' I [Abū Ishāq] asked: 'Don't you regard the detachment's commander as an Imām?' He replied: 'Yes.'¹⁵⁸ It was said: 'The people acquire a mill-stone. May they grind with it?' He replied: 'There is no harm [in doing that], but if they want to carry it to the collected booty, they should not do that except [out of] necessity. Then, they should put into the collected booty the amount from which they have benefited.' It was said: 'What if they come with it to the Territory of Islam, and its value in the enemy territory was five *dirhams* while its value [in the Territory of Islam] is two *dirhams*?' He replied: 'They should pay its value as five *dirhams*.'

Al-Thawrī was asked about [the case of] people who need animals or weapons from the booty which they have acquired. He replied: 'I prefer that they ask the Imām for permission. But if they do not ask for permission, there is no harm [in doing so]. They [may] ride [the animals] and fight [with the weapons].'

(Narrated to us by Abū Kurayb who said: "Narrated to us by Wakī' from him.") Mu'āwiya narrated to me from Abū Ishāq that he said: "I asked Sufyān [al-Thawrī] about a man whose animal is killed [in battle] or his weapon is broken, and he fights riding an animal or with a weapon taken from the booty. He replied: 'If it is [done] out of necessity, there is no harm [in doing that].'"

Al-Shāfi'ī said: "What al-Awzā'ī said is according to the *sunna* and correct reasoning, because such a [thing] is permitted out of necessity, and if the necessity ends, it is no longer permitted." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If Muslims acquire booty from the enemy people, and if there are weapons or animals in the booty and a man needs to ride [an animal] or to take from the weapons in order to strengthen himself over the polytheists, he may take that. But when the war ends, it should be given back to the booty and divided among Muslims. This is to empower the Muslims over the enemy and [therefore] there is no harm in doing that." ([Narrated to me by] al-Lu'lu'ī from them.)

Abū Thawr said: "If people need weapons and animals from the booty with which to fight, they may take them during the time that they need them before the booty is divided up. If they do not need them anymore, they should return them back to the booty to be divided. And if they are in [a state] of fear, they may [keep] using them until they leave the Territory of War or until they feel safe. And God knows best. They may do that with the permission of the Imām or without. There is no harm on them for doing that. It is the obligation of the Imām if he sees that they need such a thing. If they need, they may take what he [the Imām] is obliged to give them. And God knows best."

[Section 32]

They [Muslim jurists] agreed unanimously that it is forbidden for Muslims if they gain enemy property, whether money or goods, and they take it to the Territory of Islam or to a place where they feel secure from an enemy counter-attack, that they destroy it by burning or destroy it with any type of mischief.

[Section 32.1]

They disagreed on the permission to destroy that [enemy property] or burn it before gaining it and before overcoming the enemy.

Mālik said: "I do not see any harm in burning palm trees and destroying what has been built in enemy territory. God said:

Whether ye cut down (O ye Muslims!) the tender palm trees, or ye left them standing on their roots, it was by leave of Allah, and in order that He might cover with shame the rebellious transgressors.
[Qur'ān, 59:5]

There is no harm in putting to death the animals that empower them [the enemy combatants] to fight the Muslims in enemy territory. As for the cattle used for food consumption, I do not think their hack-tendons should be cut; [rather,] they should not be touched." (Narrated to me by Yūnus from Ibn Wahb from him.) Yūnus narrated to me from Ashhab that he said: "Mālik was asked about burning the houses and trees of the Byzantines. He replied: 'I do not see any harm [in doing that]. The Messenger of God cut down palm trees.' He was asked: 'Should their beehives be burnt?' He replied: 'Their beehives and trees should not be

burnt.' He also said: 'Follow the *ḥadiths*.' He was asked: 'Do you think that their pigs should be killed?' He replied: 'Yes.'"

Al-Awzā'ī said: "Abū Bakr al- Ṣiddīq forbade [Muslims] to cut down a fruit-bearing tree or to destroy what has been built. The Imāms of the Muslims after him did the same and their religious scholars thought the same, and I do not know of anyone who doubts that Abu Bakr and his companions were more knowledgeable in interpreting the meaning of this Qur'ānic verse than Abū Ḥanīfa, meaning God's saying,

Whether ye cut down (O ye Muslims!) the tender palm trees, or ye left them standing on their roots..."

(Narrated to me by Al-'Abbās from his father from him.) Mu'āwiya narrated to me from Abū Ishāq that he said: "I asked al-Awzā'ī and he replied: 'I dislike destroying villages, churches, and trees.' He also said: 'There is no harm in burning down a fortress, when Muslims conquer it, including what is inside it from food, a church, or a house.' I asked: 'What do you think about burning down their lodging places from outside [the fortress]?' He replied: 'It is their fortress. I do not see any harm [in doing that].' He was asked: 'What if the Imām affirms that the people should leave [the camp] to cut down trees or destroy what has been built?' He replied: 'If a man can turn away from them, he should do that. Otherwise, let him cut down only non fruit-bearing trees.' He also was asked: 'What do you think if he [the Imām] sends out people to cut down trees or destroy what has been built, and also he sends along with them a man to look for fodder and he does not help them in that?' He replied: 'He should not go out [with them], because they are going out to commit mischief in the land.'¹⁵⁹ I asked: 'Should he

break their [the enemy people] mill-stone or injure their eyes so that they cannot grind with their mill-stone?' He replied: 'No.' I asked: 'Should their canal be demolished to cut the water off from them?' He replied: 'No, unless the [Muslims] want to besiege them.' I said: 'If there is iron on the mill-stone and they [Muslims] want to take it, should [the iron] be taken from it? He replied: 'There is no harm [in doing that].' I asked: 'What if the people approach the fortress and besiege its people, and they slaughter cows and sheep in their water to contaminate their water?' He replied: 'If they [the Muslims] intend to eat from what they have slaughtered, there is no harm [in doing that]. Otherwise, I perceive this [action] only to be mischief. I do not like it if they conspire against their enemy by [doing] what is prohibited.' I asked: 'What if the enemy [might intend to] burn the pasture [needed by] a summer military expedition, and so we cut some of their trees and destroy some of their villages so that they cannot burn the pasture?' He replied: '[I prefer] that [only] some of the houses be destroyed, but I do not like [cutting down] trees.' I asked: 'What if we [need] to reside in their houses during the time of snow and cold, and we need firewood, so we destroy some of their houses and doors and some of the logs that they benefit from?' He replied: 'There is no harm [in doing] that, and they may cook and grill.' I asked: 'Should their intoxicating drinks be poured out, and should they break their jars and tear their skin receptacles?' He replied: 'As for the jars, I dislike [doing] that because they are [also] used as containers for wheat and portions of animal butter. As for the skin receptacles, none of them should be torn apart.' I asked: 'What if we find honey, and we carry what we need from it and dump the rest?' He replied: 'No, this is mischief.' I asked: 'Should their crosses in their houses and

churches be broken and [also] their idols?' He replied: 'There is no harm [in doing that].' I asked: 'What if we find containers that have food and wheat, and we do not want to carry with us [the food] but only carry the containers to the collected booty?' He replied: 'Spread the wheat and food aside and take the containers if you want, but do not commit mischief.' I asked: 'What if Muslims approach a fortress and they cut down fruit-bearing trees around it and burn down houses so that they establish a place to fight in?' He replied: 'There is no harm [in doing that]. This is a necessity.' I asked: 'Should they [Muslims] cut down fruit-bearing trees on the road so that the enemy will think that they are taking extra [space] on the road [to expand it], and they do not expand it but expand another one?' He replied: 'As for this [action], I do not like it. Cutting down all trees is permitted only if the road is narrow, and if they fear that the enemy might catch them and they would not be able to bear [the enemy's power].' He [al-Awzā'i] also said: 'If they [the Muslims] do not fear [the enemy's power], they should endure its [the road] narrowness.' I asked: 'We come to their [the enemy] crop in their country, and we let our animals pasture in it and eat from it and ruin [some of it]. Then a man wants to keep his animal leashed [for a while], so he cuts for it from the crop to eat and it eats [from the crop]. Do you fear that this might be [considered] mischief?' He replied: 'I do not know of such [judgment]. The burning of crop and pasture is disliked.' I asked: 'What do you think if Muslims come to an enemy fortress and around it there is food collected outside the fortress, and this food [provides] strength for them [enemy]. They come out and take from it and then return to the fortress?' He replied: 'If it is an incursion, they [Muslims] should not burn it, but if they want to besiege them and they are able to

collect it for themselves and prevent them [the enemy] from taking it, they should do that and not burn it.' I asked: 'What if they [the Muslims] leave? Should they leave it [there]?' He replied: 'Yes.' I asked: '[What if] the Muslims do not need it, but it is strengthening the enemy?' He said: 'They should not [burn it] unless they cannot collect it for themselves, and if they want to besiege them, there is no harm if they burn it if it is strengthening their enemy.' I asked: 'May a man cut from fruit-bearing trees a branch, a trunk, or a stick for an ax?' He replied: 'There is no harm [in doing that].' He [al-Awzā'ī] was asked: 'May he cut down a fruit-bearing tree [to use] for a tent if he does not find another [non fruit-bearing tree]?' He disliked that and said: 'Trees are abundant.' I asked: 'What do you think about the things that they acquire which they cannot carry, such as a sword, a shield, or a lance? Should [these] be broken?' He replied: 'Yes.' I asked: 'How about the silk that he [enemy person] uses to make a garment? Should it be burnt?'¹⁶⁰ He replied: 'Yes.' I asked: 'Should everything with which he [the enemy person] is strengthened be broken and burnt?' He replied: 'Yes, if it cannot be carried.' I asked: 'How about shoes?' He replied: 'He may burn them or leave them.'

"He [al-Awzā'ī] was asked: 'If people in a fortress are besieged [by Muslims], may water be cut off from them?' He replied: 'Yes.' I asked: 'What if they cannot cut off [the water], and they [enemy] have a large container? Should blood and rotten [meat] be thrown in it to contaminate it?' He replied: 'There is no harm [in doing that]. Look for ways to destroy your enemy in any way that you can, and when they are in your hands, you should not do to them [what you do before capturing them].' He was asked: 'What if Muslim captives are inside it [the fortress]?' He replied: 'There is no harm on the captives who, out of necessity,

drink their water that has rotten [meat] and blood in it.' He was asked: 'Should we cut off the water from them, even though inside the fortress are Muslim captives and the latter asked [the Muslims] not to do so because they would die?' He replied: 'They should not refrain from making *jihād* against their enemy by any means with which they hope that God may help them to win over them [the enemy], whether out of fear or something else that God might not inflict upon the captives. God might save them from their hands and [deliver them] to their brothers. And if [Muslim captives] appear to them [the Muslims] and ask them to let water flow because they are suffering from weakness and thirst, they should pass it to them.' He was asked: 'What do you think if the enemy says to them [the Muslim combatants]: "Either you leave us or we will behead your captives," and the [Muslim] captives ask them [the Muslim combatants] to go away so that they will not be beheaded?' He replied: 'Those [enemy people] are weak. I wish that they would behead any Muslim captive in their hand!' I asked: 'What if Muslims acquire enemy intoxicating drinks and pigs, and they [the enemy people] say: "Do not ruin our drinks and do not slay our pigs and we will give you such and such." Do you see that as a price for [buying] the pigs and intoxicating drinks?' He replied: 'I do not see any harm [in doing] that.' I asked: 'What if Muslim captives are in the hands of the enemy and the Muslims want to ransom them, and they [the enemy people] say, "We do not ransom [anyone] except with such and such [amount] of intoxicating drinks"?' He replied: 'I do not see any harm in [doing that]. They should buy them intoxicating drinks and ransom them. This is a necessity.'"

Al-Thawrī was asked about ruining what has been built and cutting down trees in enemy territory. He replied: 'Were it not for the tradition that has come to us on this, we would not see any harm [in doing that]. (It was narrated to me from Mu'āwiyā from Abū Ishāq from him.) He [Abū Ishāq] said: "I asked him [al-Thawrī] about breaking their idols and crosses, demolishing their fortresses, and spilling their intoxicating drinks. He did not see any harm in [doing] that.'"

Al-Shāfi'ī said: "Whatever the enemy [possesses] that has no soul, there is no harm if Muslims burn it and destroy it in any way [they can], because it does not feel pain. That which can endure pain are those creatures who have souls that can feel pain. The Prophet destroyed the properties of the Banū al-Naḍīr and burned them down, and also cut down the grape vines of Ṭā'if.¹⁶¹ This was the last expedition in which he engaged in battle." He [al-Shāfi'ī] also said: "Putting to death those that possess souls might be permitted in two ways: one of them is to put to death that which causes harm because of its harm, and [the other] is [to put to death] that which is used for food consumption for the benefit of eating. It is forbidden to inflict pain on a soul that is not harmful to him [a Muslim] without the benefit of food consumption. Thus, if we slaughter the polytheists' sheep in a situation that would not lead us to eat their meat, it would be a slaying without benefit, and they [the enemy people] would gain strength [from using] their skins and [consuming] their meat. Therefore, we would not be safe, while the polytheists would be strengthened if we slaughtered them [their animals]." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "Abū Bakr's saying, 'Do not ruin what has been built, do not burn palm trees, and do not cut down fruit-bearing

trees' [is applied] when their [enemy people] territory has been conquered and controlled [by Muslims] and it has fallen into their hands. They [the Muslims] should not do any such actions because it has become a spoil of war for Muslims. But if the [Muslim] army combatants do not have the power to reside in that territory and they are not able to appoint a leader over it, and they cannot acquire it so that it becomes theirs, then they should burn their fortresses, cities, and churches, and destroy their palm trees and [other] trees and burn them down. And whatever of their animals and cattle they acquire and cannot take out [to the Territory of Islam], they should slaughter and burn them." ([Narrated to be by al-Lu'lu'i] from them.)

Abū Thawr said: "He [the Muslim] should not put to death their cattle, burn their palm trees and crops, slay their animals, nor ruin any of their properties, unless if he does any of this, it would help to make them [the enemy people] come out [of the fortress]. And he should not put to death any of [their] animals; rather, he should take with him [from these animals] what he is able to, and what he cannot take with him, he should leave alone. This is because the Prophet forbade putting to death any animals who can be subjected to pain."

[Section 32.2]

They disagreed on the permission to ruin the spoils from the enemy's clothes and properties that Muslims gain if the enemy counter-attacks them in their [enemy] territory before the division of the booty and they [the Muslims] are not able to save the [spoils], or they have overcome the enemy but they cannot take out some of what they have acquired from [the enemy].

Mālik was asked about animals and cows in enemy territory. "Should they be hocked [in order to disable them and then put them to death]?" Mālik replied: "I do not see any harm in them hocking [the animals] if the Muslims fear that the enemy might gain power over the Muslims." He was asked: "What do you think if the enemy [people] escape and leave a lot of food and fodder that Muslims do not need?" He replied: "I do not see any harm in burning that, because this would humiliate them and anger them." Then Mālik read God's saying,

... or trod paths to raise the ire of the Unbelievers. [Qur'ān, 9:120]

[Mālik said]: "Would not they [the enemy], if subjected to this, be angered?"

Then Mālik read [the verse],

Whether ye cut down (O ye Muslims!) the tender palm trees, or ye left them standing on their roots, it was by leave of Allah, and in order that He might cover with shame the rebellious transgressors."
(Qur'ān, 59:5)

Mālik said: "The tender palm tree [mentioned in the verse] is one that does not carry the kind of dates called '*ajwa*.'" (Narrated to me by Yūnus from Ibn Wahb from him.)

Al-Awzā'ī was asked about [the case] in which Muslims acquire sheep or animals, and they are not able to take them out to the Territory of Islam. He replied: "Abū Bakr al-Ṣiddīq forbade putting to death any animal except for food consumption, and Muslim Imāms and their community followed this [instruction]; their [Muslim] scholars used to dislike it if a man slaughtered a sheep or a cow to get its skin or to eat a little from it and leave most of it. 'Umar b. al-Khaṭṭāb used to say: 'Who is for us like Abū Bakr to follow his instruction]?' It has reached us [from earlier authorities] that whoever puts to death bees, he will loose a quarter

of his reward; and whoever puts to death a horse, he will loose a quarter of his reward; and whoever does not help his companion, he will loose a quarter of his reward; and whoever disobeys his Imām, he will loose all of his reward.” (Narrated to me by al-‘Abbās from his father from him.)

He [the father of al-‘Abbās] said: “I asked him [al-Awzā‘ī] about [the case of] a man who takes something from the spoils of war and he wants to take it to the collected booty, and then he prefers to drop it and he drops it whether out of necessity or not: ‘May he do that? Is it incumbent on him not to drop it if he has carried it except out of necessity?’ He replied: ‘If he carries it, he should not drop it except out of necessity.’” He [the father of al-‘Abbās] said: “He [al-Awzā‘ī] was asked about people [Muslims] who acquire a woman and an infant boy with her, whether suckling or not, and they cannot carry him with his mother: ‘Should they carry his mother and drop the boy?’ He replied: ‘Both of them should be carried, but if they [woman and her child] cannot bear [the travel], both of them should be left behind.’” He [the father of al-‘Abbās] said: “He [al-Awzā‘ī] was asked about [the case of] people who are in a detachment and they acquire a woman, but she cannot travel with them and they do not have a carrier for her. And they fear that if they leave her alone that she would tell on them. Or similarly [the captive may be] a boy who has not yet reached puberty or an old man. He replied: ‘Anyone who is forbidden to be put to death should not be slain based on hearsay.’”

Al-Thawrī said: “If you acquire a woman, a boy, or an old man and you cannot carry them, they should be left behind and not put to death.” (It was narrated to me from Mu‘āwiya from [Abū Ishāq] al- Fazārī from him.)

Al-Shāfi'ī said: "There is no harm in burning what does not have a soul."

He [also] said: "If we besiege them and we acquire horses from them, or we try to push the horses away from them and they [the horses] return to us, or if we engage in battle and the [horses] are in our hands, or we fear defeat and the [horses] are in our hands, and we do not have a need to ride them but we want to take them as booty, or we have a need to ride them, or there are cattle with them or bees or anything that has a soul [taken] from their properties which is permitted for Muslims to acquire for food consumption, [in such cases] it is forbidden to put to death any of it or kill it in any shape or form unless we slaughter it [for the reason of food consumption]." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If there are, among what Muslims acquire as booty, mounts, she-camels, and sheep, they should be herded with them to the Territory of Islam. And if they are unable to herd them, they should slaughter the she-camels, sheep, and mounts and [then] burn them with fire so that the enemy people cannot benefit from them. They [the Muslims] should not hock them, because this is mutilation and the Prophet forbade mutilation. And if there are, among the acquired booty, weapons, goods, and many utensils, and they do not have enough carrying animals to carry all that on them, they should burn all that with fire and not leave it for the enemy people to benefit from. The same [should be done] regarding whatever spoils Muslims acquire from their goods and weapons in the Territory of War. They [Muslims] should not hock the animals [in the spoil] because that is mutilation." ([Narrated by] al-Lu'lu'ī from them.)

[Section 33]

They [Muslim Jurists] agreed unanimously that whoever from the military's men is able to carry [an item of] enemy property may leave it behind and not take it to the collected booty, whether this happens before overcoming the enemy or after. And whoever takes anything that is forbidden for him to take without [the rest of] the army should bring it to the collected booty, and he is not permitted to throw it away after taking it if he [originally intended] to take it to the collected booty.

They also agreed unanimously that it is forbidden for anyone from the military who is able to take [anything] from their [enemy people's] ready cash after overcoming them, to hide it from the rest of the army, and that he should give it to the collected booty, and that this [retaining the money] is [considered] unlawful booty about which God has said: "Whoever gets unlawful booty, he will come with what he unlawfully acquired on the Resurrection Day."

They also agreed unanimously that the rule concerning goods that someone from the Muslim army takes from their properties is the same as the rule concerning ready cash, [whether] *dīnārs* or *dirhams*, if what he takes has a value and significance, and it is not eaten, drunk, or used for fodder.

[Section 33.1]

Muslim jurists disagreed on the trivial thing that has only a small value.

Mālik was asked about taking a needle: "Is this considered unlawful booty?" He replied: "If he benefits [from taking it], I do see that as trivial." (Narrated to me by Yūnus from Ibn Wahb from him). He [Mālik] was asked about people who go in a raid and they acquire booties, then they throw away things,

such as a food container and the like from the goods, and they leave them behind. Then a [Muslim] man takes [such a] thing. "Do you think that it is his [to keep]?" Mālik replied: "Anything that is not profitable and is not intended for sale which they leave behind, there is no harm that incurs on the one who takes it, and I do not hold that there is a one-fifth share in it. And God knows best what is in the hearts of all creation."

Al-Awzā'ī was asked about goods in the land of the Byzantines when they [Muslims] cannot carry them [with them]. "May a man take it?" He replied: "He should make it lawful at least [by giving] one share that he puts in the collected booties." (Narrated to me by al-'Abbās from his father from him.) It was narrated to me by Mu'awiya from Abu Ishaq that he said, "I asked al-Awzā'ī: 'What do you think about what people acquire in the enemy's country that is not food, drink, seasoning, or fodder? Should everything be given to the collected booty?' He replied: 'Yes.' I [Abū Ishāq] asked: 'What if it does not have a value and the administrators who are charged with dividing the booty refuse to accept it from him, and another man wants to benefit from it?' He replied: 'If it is from what the enemy [people] acquire [in their homes], I prefer that he make it lawful [by paying] something. But if it is from what they do not acquire in their homes, such as trees, stones, arrows used for gambling, a sharpening stone, or medicines, then if any of these do not have a value, anyone who wants to take it may do so. And if it does not have a value when he carries it and then he repairs it and it becomes valuable, it should still be his, and he should not be accounted for [having] it.'"

Al-Thawrī was asked about that, and he replied: "If he comes with it to the Territory of Islam and it has a value, he should put it with the collected booty

even if it had no value in the enemy country.” He [also] said: “If it has no value until he carries it and repairs it, he should be given [a share] that is equivalent to his work on it, and the rest of it should be [put] with the collected booty.” (It was narrated to me from Mu‘āwiya from Abū Ishāq from him.)

Al-Shāfi‘ī said: “A small amount of unlawful booty and a large amount are forbidden.” He corroborated his view with a tradition on the authority of ‘Abdullāh b. ‘Amr from the Prophet that he said: “If you pull an arrow beside you [and take it] in the enemy country, you do not have more right to it than your brother.”¹⁶² (Narrated to us from al-Rabī‘ from him.)

[Section 33.2]

They disagreed on the spoil of a slain [enemy combatant] taken by the one who put him to death. Is it lawful for him [to take] or not?

Mālik b. Anas was asked about [the case of] a [Muslim] man who puts to death a man from the enemy. “Does he have [the right] to take his spoil without the Imām’s permission?” He replied: “It does not belong to anyone except with the Imām’s [permission]. And it is not for the Imām [to give permission] except as an independent opinion. It has not reached us that the Messenger of God instituted this [practice] and ordered following it after [the battle of] Ḥunayn. Therefore, this is an old commandment, and no one has a tradition to say about it. And it has not reached us that the Messenger of God said this or practiced it after the day of Ḥunayn. Then Abū Bakr came after the Messenger of God and sent armies [to battles], and it has not reached us that he practiced that. Then came

‘Umar b. al-Khaṭṭāb, and again it has not reached us that he practiced that.”
(Narrated to us by Yūnus from Ibn Wahb from him.)

Al-Awzā‘ī said: “The practice of the Messenger of God used to be, in relation to the one who puts to death a disbeliever, that he has the right to take his spoil. And Muslim Imāms have practiced that since his [time] until this day.” (Narrated to me by al-‘Abbās from his father from him.) He [the father of al-‘Abbās] said: “He [al-Awzā‘ī] was asked about [the case of] a man who puts to death a disbeliever: ‘May he take his spoil with his Imām’s permission?’ He replied: ‘He should not take any of his spoils except with his Imām’s permission.’” He [the father of al-‘Abbās] said: “He [al-Awzā‘ī] was asked about [taking] the spoil [of a slain enemy combatant]: ‘What is the consensus regarding it? Should the one-fifth share be [taken] from it or not?’ He replied: ‘It has reached us that ‘Umar b. al-Khaṭṭāb ordered that the one-fifth share [be taken] from the spoil of [a slain enemy combatant].’”

He [the father of al-‘Abbās] said: “He [al-Awzā‘ī] was asked about [the case of] a man who duels with a disbeliever and the disbeliever’s rope of his bow is in his hand. Then the Muslim puts him to death: ‘May he [the Muslim] have his bow with [the rest of] his spoil?’ He replied: ‘His bow is not part of the spoil if he [the Muslim] puts him to death and the [disbeliever] leaves it [aside] during the fight.’” Mu‘āwiya narrated to me from Abū Ishāq that he said: “I asked al-Awzā‘ī: ‘Should taking the spoil be for the one who puts to death [the enemy person] even if it is not in a dual?’ He replied: ‘Yes, whoever puts to death [an enemy combatant] should have the right to take his spoil’...¹⁶³ He said: ‘No, if he does not face him with a weapon.’ I [Abū Ishāq] asked: ‘What if he takes him

captive then puts him to death?' He replied: 'His spoil should not be for him.' I asked: 'What if he attacks a disbeliever and holds him by his neck, and then another [Muslim] comes and puts him to death?' He replied: 'His spoil should be only for the one who holds him by his neck.' He [al-Awzā'ī] said: 'If a disbeliever pierces the body of a Muslim with a lance and throws him on the ground, then the Muslim stands up and the disbeliever dismounts from his animal and engages in fighting with him, and it is feared that he [the disbeliever] will overcome [the Muslim], then a [Muslim] man comes and puts him to death,' [in such a case,] he [al-Awzā'ī] said: 'His spoil should be for the one who kept [fighting] him.' He [al-Awzā'ī] was asked: 'What if a man captures a disbeliever, then he brings him to the Imām, and the Imām puts him to death?' He replied: 'He should not have his spoil.' I [Abū Ishāq] asked him: 'A man duels with an infidel, then the infidel puts some of his weapons on the ground and fights [the Muslim]. Then the Muslim puts him to death. Should he [the Muslim] get what [the disbeliever] put on the ground from among his weapons with [the rest of] his spoil?' He replied: 'No, except what was on him.' I asked: '[What if] a man duels with a disbeliever and he hits him and throws him on the ground, and then he captures him wounded and takes him with him to the Imām, but he dies in his hand before reaching the Imām?' He replied: 'He should not have his spoil, unless he puts him to death and he dies on the spot.' I asked: 'What kind of spoil [in such a case] is permitted?' He replied: 'His horse that he rode while fighting him and his weapon with its case.' I asked: 'What if a bag that contains money was on him?' He replied: 'He should not have the bag that contains money.' He also said: 'If he fights him while riding his horse and then he [the Muslim] dismounts from it and fights him

while the leading rope of [the disbeliever's] horse is in his [the Muslim's] hand and he puts him to death, he should not get his horse.' I asked: 'Unless he [the Muslim] throws him off his horse to the ground with a stab or a hit?' He replied: 'Yes, if [the Muslim] pierces his body with a lance while riding his horse, and he [the disbeliever] is thrown off his horse or he dismounts after he [the Muslim] pierces his body with a lance, and he [the Muslim] continues fighting him and puts him to death, his animal should be for him with [the rest of] his spoil.' He also said: 'If the disbeliever fights with him while on the ground and the Muslim pierces his body with a lance, then the disbeliever rides his horse and then another [Muslim] reaches him and puts him to death, the spoil of the disbeliever should be for the one who first attacked him with the lance, and his horse should be for the one who put him to death while riding on it. And if he duels with a disbeliever and the latter's horse slips and throws him off, then another [Muslim] puts him to death, his spoil should be for the one who puts him to death, i.e. if he actually fights with him.' I asked: 'What if a man duels with a disbeliever and puts him to death and takes his spoil, and it was the first booty to be acquired, should that be considered spoil [assigned by the Imām] (*nafl*), and therefore he would not give him this spoil? He replied: 'He [the Imām] should give him his spoil.' It was said [to him]: '[What if] a man duels with a disbeliever, and then another [Muslim] comes and puts him to death?' He replied: 'This is not right, and the spoil should not be for any of them, but it should be among the booty.' It was said to him: '[What if] a man attacks a horse carrying [an enemy person] and puts him to death, and he [finds out] later that she is a woman?' He replied: 'If she faced him with a weapon, he should get her spoil. And a boy is the same: if he fights and is

put to death, his spoil should be for the one who puts him to death.' I asked: '[What if] a man shoots his arrow at a disbeliever while he is inside a fortress or on the [army] line and puts him to death? Should he get his spoil?' He replied: 'No, unless he duels with him and shoots at him with an arrow or a stone, or aims his lance at him and puts him to death. [In such a case], he should get his spoil. He [al-Awzā'ī] was asked: '[What if] a man duels with a disbeliever and puts him to death, but he [the Muslim] cannot get his spoil before he is also put to death?' He replied: 'His spoil should be paid to his heirs.' It was said: 'A *mu'āhad* puts to death a disbeliever. Should his spoil be given to him?' He replied: 'Yes.' I asked: 'A slave or a worker puts to death [an enemy combatant]. Should he get the spoil?' He replied: 'No, but if the Imām wills, he may give him [a share].' He was asked: '[What if] a disbeliever is chased by people, and they corner him in a cave that has no passage [of escape] and one of them puts him to death?' He replied: 'His spoil should be for the one who puts him to death.' He was asked: 'A man duels with a disbeliever who has a woman with him, and he puts him to death. Should the woman be included with his spoil?' He replied: 'No.' It was said: 'A man duels with a disbeliever, and he [the Muslim] hits him and throws him [off his horse] and thinks that he has put him to death. And while he is taking his spoil, the disbeliever jumps up and escapes. What should he do with the spoil that he takes?' He replied: 'He should put it with the [designated] spoils of war.' I asked: 'What do you think if a man leaves behind the spoil of the enemy person that he has put to death or the spoil that is given to him by the Imām which he does not take?' He replied: 'He is doing a righteous deed, but if he takes it, he takes it lawfully.' I asked: 'If the Imām wills, may he allow the one who puts to

death [an enemy combatant] to take his spoil, or if he [the Imām] wills, may he not allow him to take the spoil?' He replied: 'No, [a man's] spoil is for the one who puts [him] to death.' I asked: 'If the one who puts to death [an enemy] fears that the Imām will not [allow] him to take the spoil, and he is able to take it secretly, may he take it?' He replied: 'No, this is a transgression. He should not take it without his [the Imām's] permission.' It was said: '[Should] their [enemy combatants'] slain [people] be [divested of their clothes] until they are left naked?' He replied: 'May God not [expose] their private parts [to Muslims], and it would be better if something was left to cover them.'" Al-'Abbās narrated to us from his father that he said: "Al-Awzā'ī was asked: 'Was there any spoil for those who put to death [enemy combatants] on the day of *maghār* when [the raid] was [dependent on] the strength of all the people?' He replied: 'There was no spoil in what you have mentioned.'"

Al-Thawrī was asked about [the case] of a Muslim who attacks a disbeliever and the latter surrenders to him, and then he puts him to death. He replied: "I think that he may take his spoil, i.e. if he duels with him." (Narrated to me by Mu'āwiya from Abū Ishāq from him.) It was said to him: "Should [all] the spoil of their slain [combatants] be taken until they are left naked?" He replied: "I dislike leaving them naked."

Al-Shāfi'ī said: "The spoil [of an enemy combatant] is for the one who puts [him] to death when facing [the enemy] in war, whether dueling or not, whether stated by the Imām or not. This is the ruling of the Messenger of God and the ruling of those who instated it. The Prophet said so on the day of Ḥunayn and on other days of battles, and the Imāms after him said [the same]." He [also] said:

“What I do not doubt is that the spoil should be given to the one who puts to death [a polytheist] while the polytheist is facing [the Muslims] and the war is still waging and the polytheists are fighting.” He said: “And if a group of [Muslim combatants] participate together in putting a man to death, his spoil should be divided among them. And if a [Muslim] man strikes a man with a strike the like of which does not make [a person] live, or a strike the like of which [a person] becomes disabled, such as if he cuts off his hands and feet, and then another [Muslim] puts him to death, the spoil should be for the one who cuts off the hands and the feet because he puts him in a state in which he cannot prevent [anyone] from taking his spoil nor can he prevent [Muslims] from attacking him. And if he [the Muslim] strikes him and there still remains in him the ability to defend himself, and then another [Muslim] puts him to death, the spoil should be for the latter. The spoil is for the one who puts him into a state in which he cannot defend himself. The spoil that the one who puts [an enemy combatant] to death gets is every garment that he wears, every weapon he carries with its case, and his horse if he is riding or handling one. But if it [the horse] is away from him or with someone else, it is not [considered] his. His spoil is what he [the Muslim combatant] takes from his hands or from what is on his body or beneath it. And if his spoil includes a gold bracelet, a ring, a crown, or a sword case that is valuable, and if someone thinks that since this is on him, it should be [considered] part of his spoil, it is a [legitimate] point of view. And if he says that this is not war equipment and that he may take [only] the spoil of a slain [enemy combatant] that is [considered] his weapon, it is another [legitimate] point of view.” He [al-Shāfi‘ī] said: “There is no one-fifth (share) in the spoil [of a slain enemy

combatant], because the Prophet said: 'Whoever puts to death [an enemy combatant] should get his spoil.'¹⁶⁴ He did not exclude a little amount of spoil or a large amount." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "The assigned extra spoil [should be given] before the booty [is divided]. Thus, the Imām should not dedicate extra spoil [to anyone] from the booty after it falls in the hands of Muslims. But if he wants to dedicate extra spoil [for someone], he should say before they collect the booty: 'Whoever acquires a captive should get his spoil,' or say: 'Whoever puts to death [an enemy combatant] should get his spoil.'" They [also] said: "If a man puts to death a polytheist and takes his spoil, the Imām should not give it to him as a dedicated extra spoil because [in such a case] it becomes part of the booty." ([This is] the narration of al-Lu'lu'ī from them.)

Abū Thawr said: 'If a [Muslim] man puts to death a man from the enemy people, he should get his spoil and there should be no one-fifth share in it. This is because the Prophet said: 'Whoever puts to death an [enemy combatant] should get the spoil,' and he did not mention after that a one-fifth share. Thus, whoever puts [an enemy] to death in a duel, in a battle when [combatants are] facing each other, or after the [enemy] people are defeated, he should get the spoil. This is because the Prophet said: 'Whoever puts to death an [enemy combatant] should get the spoil,' and he did not say whether facing [the enemy] or chasing [them] or in a duel."

'Umar b. al-Khaṭṭāb took a one-fifth share from the spoil [collected by] al-Barā' b. Mālik. (Narrated to us by Abū Kurayb, saying, "Wakī' narrated to us from Sufyān from Hishām from Ibn Sīrīn that he said: 'Al-Barā' b. Mālik dueled

with the brother of Anas b. Mālik, Murzubān al-Zāra, and he put him to death and then came with his spoil, and its value was thirty thousand.' 'Umar b. al-Khaṭṭāb said: 'We have not taken a one-fifth share from the spoils, but this is a property of great value,' and he took a one-fifth share from it. This was the first spoil from which a one-fifth share was taken in the Islamic [era].'"¹⁶⁵ Ibn 'Abbās said: "The spoil [of a slain enemy combatant] is part of the extra spoil [given by the Imām]." (Narrated to me by Yūnus from Ibn Wahb from Mālik from Ibn Shihāb from al-Qāsim b. Muḥammad from him.)

[Section 33.3]

They disagreed on the extra spoil that is lawful for the one who is given it [by the Imām].

Mālik b. Anas was asked about the extra share of spoil: "Should it be in the first [collected] booty?" He replied: "This is according to the discretion of the Imām. We do not have a known view on this [case] except the discretion of the sovereign authority. It has not reached me that the Messenger of God dedicated an extra share of spoil [to a Muslim combatant] in all of his military campaigns, but it has reached me that he dedicated an extra share of spoil in some of them. This is, therefore, up to the discretion of the Imām, whether in the first [collected] booty or after." (Narrated to me by Yūnus from Ibn Wahb from him.) He [Ibn Wahb] said: "Then I asked Mālik: 'Should [the Imām] grant an extra share that is larger than the spoil [of a slain enemy combatant]?' He replied: 'There is no specific limit. This is based on the discretion [of the Imām].'" Yūnus narrated to me from Ashhab that he said: "Mālik was asked about the provincial governor: 'If

he grants an extra share to some of the army [combatants], from where should he give them this share? [Should he grant it to them] from the one-fifth share or from all of the booty?' He replied: 'What I like most is [that it be taken] from the one-fifth share.' Then he was asked: 'From the one-fifth share?' He replied: 'Yes.'"

Al-Awzā'ī said: "The one who puts [an enemy combatant] to death has the right to the spoil [of the slain enemy combatant]. The *sunna* of the Messenger of God was as such. But no one should be granted the spoil [of a slain enemy combatant] after conquering [the enemy territory]. It is not right for the Imām to say, 'Whoever acquires something, it is his after taking a one-fifth share,' because he [the Imām] does not have the strength to enter into the Territory of War and acquire booty in it except with the army that marches with them into the Territory of War." (Narrated to me by al-'Abbās from his father from him.) He [the father of al-'Abbās] said: "Al-Awzā'ī said: 'The [lawful] practice is that there is no extra share of spoil given from gold, silver, pearl, or the first booty. And there is no [lawful] spoil [of a slain enemy combatant] on a day of defeat or conquer.'" He [the father of al-'Abbās] said: "He [al-Awzā'ī] was asked about [the case in which] the Imām sends a detachment and they acquire [booty], and he [the Imām] has already named their extra share as one-third or one-fourth, but he wants to increase their share. He replied: 'He should not increase [their share] beyond what he has named for them nor should he grant them anything from the one-fifth share [of the booty].'"

It was narrated to me from Mu'āwiya from Abū Ishāq that he said: "I asked al-Awzā'ī: 'What was the way of [granting] an extra share, and how did they [the early Muslims] do it before?' He replied: 'The way it was done when the

Imām left for a military campaign with the people is that he would not name [the amounts of] extra shares until he had sent his detachments. And when the first detachment came with booty, he would not grant it any extra share from what it had brought, because there would be no extra share given from the first booty. Then he would grant an extra share to the other detachments, and he would clearly state the amount.' I asked: 'Is it for him to decide whether to grant the detachments an extra share from what they have brought if he wills, even if he did not name for them an extra share when he sent them?' He replied: 'Yes.' I asked: 'How about the Prophetic tradition that says, 'There is no extra share after [collecting] the booty?' How [should its meaning] be interpreted? He replied: 'If he sends his detachments and he does not name for them an extra share, and he does not have this intention when he sends them to grant them an extra share, then they come with a booty and it has already gone out of his hand and the official who divides the booty has received it, he should not grant them an extra share from it. Otherwise, he may grant them an extra share if he wills.' I asked: 'If he sends a detachment and names for it an extra share or addresses the people and grants the detachments extra shares and he names that, then a detachment comes with booty and it is the first one, should he fulfill his promise to them with what he has dedicated to them or reject [doing that]?' He replied: 'He should fulfill his promise with what he has dedicated to them, but he is ignorant when he names an extra share for them before the first detachment comes to him with booty. But if he already has named an extra share and they leave [the Territory of Islam] with this [promise], he should fulfill what he has named to them on the condition that it not exceed one-third.' I asked: 'What is the maximum of what the Imām grants as

an extra share?' He replied: 'He should not exceed one-fourth at the beginning [of the campaign] and one-third when [the detachment] returns, and if he wants, he may grant less than that after taking the one-fifth share.' I asked: 'If he sends a detachment in the beginning [of the campaign] and dedicates to it one-third and they acquire booty, should he reduce their share to one-fourth or fulfill his promise to them?' . . .¹⁶⁶ I asked: 'Who should grant an extra share? Is he the *amīr* of [all Muslims] or the one who leads [the army] at the front?' He replied: 'If the Imām sends a commander at the front, and then the latter sends his expeditions, the commander at the front may grant them the extra share.' I [Abū Ishāq] asked: 'What if he [the Imām] sends a detachment and names for it an extra share, then he sends another detachment and does not name for it an extra share, but he has the intention to grant it an extra share with an amount that is equal to the other's?' He replied: 'Let him give to them in accordance with what he intends to do.' I asked: 'Should the Imām give an extra [amount] to some expeditions over others?' He replied: 'Yes, if he wants and if he does that out of concern for the people.' I asked: 'If he wants, may he give them something [as a gift]?' He replied: 'Yes.' I asked: 'What if he sends a detachment and they [the combatants] acquire three heads of something, and he has granted them one-third so he gives them one head, but they find a defect in it?' He replied: 'They should return it, and it should be evaluated with the other heads and he should then give them their extra share from that [amount].' I asked: 'What do you think if the Imām sends three people or one man and he acquires something? Do you consider those as a detachment?' He replied: 'Yes, the Prophet sent three people [as a detachment].' I asked: 'What if he sends some of his detachments before others and they disperse,

and then one of them comes with booty and he has sent another one before this one?' He replied: 'The first detachment that brings him booty is considered the one [bringing] the first booty, and he should not grant it any extra share, but he may grant the one after it, even if another [detachment] has been sent before it. And if he sends a detachment and a man [or group] among them acquires something, then they acquire after that something else, then what those acquired first should not be [considered] as the first booty until they return to him [Imām].'

I asked: '[How about] if the Imām says, 'Whoever comes with a captive should get his spoil'? He replied: 'He is not permitted to do this.' I asked: '[What if] he says, 'Whoever carries a shield, and raids with it, or a large tent or a man's armor (*tijfāf*) will get such and such from the booty?''¹⁶⁷ He replied: 'This is not permitted for him [to do], and this is an unprecedented event. Thus, if a man is ignorant about that, the Imām should fulfill his promise to them from his own property.' I asked: '[What if] the Imām says when the ranks of the two armies are facing each other: "Whoever comes with a captive will receive such and such from their booties that are in the hands of Muslims or from something that he acquires?" He replied: 'This is not the right thing. Then the booties of Muslims will be consumed, but if he has a property from what God has bestowed on him and he dedicates some of it for them, there is no harm [in doing that]. They used to carry properties [with them] for such [cases].' I asked: '[What if] he reaches a fortress and he sees an opening in it and says, 'Whoever enters through this opening will receive such and such when the fortress is conquered, or if he stands fast, he will receive such and such?' He replied: 'There is no harm [if he says], 'If the fortress is conquered, he will receive this, and if it is not conquered, he will

not receive anything.' I asked: '[What if] the fortress is conquered, by the will of God, and Muslims enter it, then they find in it an underground chamber and the Imām says, "Whoever enters this chamber and takes out from it something will receive one-fourth or one third"?' He replied: 'There is no harm [in saying that] if he does not increase [the amount] over one-third after [taking] the one-fifth [share].' I asked: '[How about] the case of a detachment that sends horsemen and foot soldiers who acquire booty, and a certain amount of extra spoil is dedicated to them? He replied: 'The horsemen and foot soldiers are the same in terms of the extra spoil. Any one of them should not be preferred over the others.' I asked: '[What]] if a detachment brings the Imām its booty and he pays them their dedicated extra share from animals and other things and he takes the rest of the booty, then the booty is lost or the extra share in the people's hands is lost?' He replied: 'Whatever remains is for the one who has it. Each should not regain the other's [share of spoil].' I asked: '[How about the case of] the Imām who sends all of his detachments and tells them: "Whoever acquires something individually will receive from it one-third or one-fourth, excluding his companions"?' He replied: 'This is an innovation. This is not right.' I asked: '[How about the case of] the Imām who sends a detachment and dedicates to them a certain amount of extra share of spoil and they acquire booty, then they face their enemy and send to their commander to provide them with military support, so he sends them more troops and the latter reach them when they have already defeated their enemy and collected their booty?' He replied: 'They should not share with them their dedicated extra share of spoil.' It was said to him [al-Awzā'ī]: 'A detachment is sent and to it is dedicated [in advance] a certain amount of extra share of spoil.'

Then they acquire booty and also find in the enemy's hands a Muslim captive, and they save him from them. Does this captive share with them their dedicated extra amount of spoil?' He replied: 'As for the extra share, he does not. But he should have a share with the Muslims.' I asked: '[How about the case of] the Imām who calls upon the horsemen to send them in a detachment and he dedicates for them a certain amount of extra share of spoil, but when they gather in front of him, he thinks that he should not give them an extra share or he should decrease the amount that he has dedicated to them?' He replied: 'This is for him [to decide] unless they go out [to face the enemy in battle]. He should say to them, 'Whoever wants may go out and to him will be dedicated such and such amount of extra share, and whoever wants may stay.' I asked: '[How about the case of] a man who leaves the troops for a need or to get fodder and he acquires booty and he brings it to the Imām, but the Imām does not dedicate for [the troops] any extra share of spoil and he has not even alluded [to having an extra share]?' He replied: 'If the Imām wills, he may give them [what he has acquired] as an extra share. They used to give [that] as an extra share in such [cases].' I asked him: 'What do you think about a detachment, to which has been dedicated in advance an extra share of spoil, that acquires money, gold, silver, or precious stones?' He replied: 'There is no extra share in these. Rather, this is for all the army [combatants] to share.' I asked: 'Even if it is silver that is not *ḍīnārs* or *dirhams*?' He replied: 'Even so.' I asked: '[How about] the swords, saddles, ornate sword cases, necklaces, and earrings that they acquire?' He replied: 'There is no extra share given from jewelry or from gold or silver, but there is an extra share given from slaves, animals, commodities, swords, and ornate cases.' I asked: '[What if] a

servant goes out with a detachment?' He [al-Awza'i] offered different opinions. One time he said: 'He should have an extra share,' and another time he said: 'He should not have an extra share.' I asked: 'A *mu'āhad* goes out with a detachment. Should an extra share be dedicated to him with them?' He replied: 'Yes. And if a slave leaves a detachment to get fodder or for a need and he acquires something, he should not retain [what he acquires] as an extra share, even if he is with the detachment, because this extra share should be given to his master. But the Imām may give a specific amount to a slave [not as an extra share].' I asked: '[How about] if the Imām sends out a detachment [to face the enemy in battle], and then the commander of the detachment sends out from his detachment another [smaller] one and he dedicates to them a certain amount of extra share?' He replied: 'This is not for him [to decide] unless the Imām permits him to do so. But if he has already done so, I prefer that he fulfill his promise to them.' I asked: '[How about] if two men raid [the enemy] and they share what they acquire from the spoil, and then one of them leaves with one detachment and the other with another detachment?' He replied: 'This is not right.' I asked: '[How about] if troops pass through enemy land and they see a herd of horses or something on the road, and the Imām says, "Whoever brings back anything will receive from it one-third or one-fourth," and the people hasten and bring it back?' He replied: 'It is lawful for them after [taking] the one-fifth [share].' He also said: 'The Imām should not pay to each detachment that brings him booty its dedicated extra share of spoil until it brings him all of its booty, including captives and other [booties].' I asked: 'The Imām sends out detachments and they bring back many herds of horses, and some of them [detachments] bring more than others, and it is not

known what [exactly] those have brought and what others have brought, and it is not possible to calculate it and sell it based on this state or to give each detachment its [exact] extra share of spoil until [the booty] is brought to the Musayyisa and sold there. [What is the rule regarding this case?]' He replied: 'If this is the case, it is a necessity. He should give them based on the amount of spoils they come with.' I asked: '[How about the case of] the Imām who calls upon the horsemen and they gather at his post, and he wants to send some and keep others, and he dedicates a certain amount as an extra share, and those who are kept say: "We are willing to leave even without any extra share, so why would you dedicate an extra share to these [combatants] and prevent us from leaving when the people are motivated to leave [for battle]?"' He replied: 'Whatever the Imām dedicates to them is permissible if he does that out of consideration for the people in general.' He was asked: 'An Imām sends a detachment [to the war front] and he dedicates to it a certain amount of extra share of spoil. Later, it comes back with its booty, but the Imām wants to distribute the booty among the people in general and to cancel their extra share. He asks [members of] the detachment to willingly accept his decision. Some of them are pleased but others are not. What should the people in general do with the [cancelled extra shares] that have become mixed with their own [original] shares?' He replied: 'A man should give in charity an amount equivalent to the one that entered his share.' I asked: [Say there is] a man to whom the Imām says: "Go with a group [of combatants] to a herd of horses and lead the group to it and bring it [to me], and the group will receive such and such." He [the man] says: "I will not do that unless you allocate only for me an animal from it in addition to the extra share,"

and the Imām does and makes him their leader. [What is your ruling on this?]' He replied: 'The worst thing he does is when he allocates that only for him and not for his companions. This is because when he acquires anything from that [herd], he does that by the power of his companions. And I think that since he has already made this allocation to him, he should fulfill his promise with what he has allocated to him.' I asked: '[How about the case of] a non-Muslim with a pledge of security who is walking with us in the army, and the people see a herd of horses that they did not want to seek, and the non-Muslim says to the Imām: "Do you permit me to go to this herd and bring from it one horse that I need to ride and that would be only for me and not for other people because I am unable to continue walking with you?"' He [al-Awaza'i] replied: 'There is no harm in doing that if he dedicates it to him after [taking] the one-fifth share. This is a necessity.' I asked: 'We reach a village and a non-Muslim with a pledge of security who came with us starts going out to the villages where the Muslims have ejected the enemy, and he comes back with goods and says, "This is mine." [What is the rule in such a case?]' He replied: "If he says to the Imām when he intends to leave, "I have some goods, and I need to leave and bring them" and the Imām permits him, they should be his. But if he leaves without the Imām's permission and comes with something, he [the Imām] should dedicate to him from it what he sees fit after [taking] the one-fifth share, and the rest should be [put] with the collected booty.' I asked: 'What if he says to the Imām: "Do you permit me to leave and bring something, and whatever I bring, I would receive half of it without [taking] from it the one-fifth share," and he [the Imām] does [give him permission?]' He replied: 'The worst thing he can do is to make a condition for him to not take the

one-fifth share, but I think he [the Imām] should fulfill his promise to him with what he has allocated to him.”

He [the father of al-‘Abbās] said: “I wrote to al-Awzā‘ī asking him about a detachment that is sent out and to which is dedicated an extra share, but one of the combatants loses the way or his animal dies, so as he is away from his detachment, he rejoins the main army after his companions [in the detachment] have acquired booty or before they have acquired anything, then they also acquire booty after he leaves them. He wrote back to me [the following]: ‘Whatever booty they acquire before their companion returns to the main army, he should share it with them, but he should not get any of their booties that they acquire after he has reached the army.’ And [I asked him] about a group [of combatants] who leave the military camp looking for fodder nearby or far from it with or without permission, and they acquire booty or some of them acquire it and others do not: ‘Should they share the dedicated extra spoil?’ He wrote: ‘Whoever acquires something and his companions do not, he should be given his amount of extra share and they should not.’ And [I asked him] about the Imām whose main army acquires booty when he already has sent out his detachments, and [this booty] is the first one acquired from the booties. He wrote: ‘If the first one that acquires booty is the Imām in his main army, he should give an extra share of spoil to the detachments after that from whatever they come with because what he acquires with his army is considered the first booty.’ And [I asked him] about [the case of] an Imām who sends out his detachments and dedicates to them a certain amount of extra share of spoil, then he thinks that he himself should leave with a detachment out of consideration to the people in general: ‘Should he receive an

extra amount of spoil similar to anyone of them?' He wrote: 'I do not know that there is any harm in doing that.' And [I asked him] about a detachment that he [the Imām] sends out and to which he dedicates an extra share of spoil, then they come back to their army and he gives them their extra shares, then the enemy faces them [in battle] and they save from the Muslims all of what they have acquired as booty and the extra shares of the detachment's [combatants]. Then the Muslims overcome the enemy and they regain all of [their belongings] that they [the enemy combatants] have saved, including the extra shares of their companions. He wrote: 'It is for them when they are given it as extra share and they receive it [as] one of their own properties, and [therefore] it should be returned to them.'"

He [the father of al-'Abbās] said: "I also wrote to him [al-Awzā'ī] [asking him the following]: 'What do you think if the enemy faces Muslims [in battle] and they fight them [after a detachment's combatants come with booty] but before the latter can receive their dedicated extra shares, and then the Muslims defeat [the enemy combatants]? Should facing the enemy and fighting them cancel the extra shares of those who have already been awarded them since the Muslims are fighting to keep all of their booties?' He wrote: 'If [the combatants] of that specific detachment bring back their booties to the army and these are received from them, they deserve to get the dedicated extra shares. And it becomes a calamity that has touched them [for not getting their extra shares]. [Therefore,] the Imām should give them back their extra shares.' And [I asked him] about a commander who sends out detachments and dedicates to them an extra share, then two detachments come back to him at the same time, not preceding the other, and

they are both [carrying] the first booty. He wrote: 'These are two detachments that have been sent out and their return has happened at the same time; thus, from each one of them a half of what it has acquired [as the first booty] should be taken.' And [I asked him] about a commander who sends out a detachment and dedicates for it an extra share, then it comes back to him with booty, but he does not send out another one and they do not acquire another [booty] until he [the commander] returns [to the Territory of Islam]: 'Should he fulfill his promise to them with what he has dedicated to them, or should he not since it is the first booty?' He wrote: 'He should give them their extra share that he has dedicated to them. And if he is ignorant, not fulfilling his promise would be greater [mischief] than his hasty [decision] to award an extra share to the first detachment when he sends it.' And [I asked him] about a commander who sends out two detachments and dedicates to them an extra share, and both acquire booty, then [the combatants of] one of the two detachments send their good news to the commander and tell him of the booty they have acquired, and then the other detachment comes back with its booty. Thus, the good news [of the first detachment] has reached the commander [first], and [the combatants] have told him about their booty before the [other] detachment reached him with its booty: 'Which detachment [should be considered the one bringing] the first booty?' He wrote: 'The first one that comes to the Imām with its booty should be [considered the one] bringing the first booty. This is because telling the good news is not the first booty.' And [I asked him about] a commander who sends out a detachment and dedicates to it an extra share and it goes [to battle]. Then he chooses to follow them and he finds them with the booty they [have acquired], and they are residing at a fortress that they

hope to conquer: 'Would his coming to them cancel their extra share?' He wrote: 'They should get their extra share from what they acquire before their commander comes to them.' And [I asked him] about a commander who sends out a detachment and dedicates to it an extra share, then they [the combatants] reach a fortress or an underground chamber and besiege [the enemy]. Then the commander of that detachment dedicates an extra share to one man among them, saying: 'Whoever enters the fortress or the underground chamber will receive such and such from the extra share' that the commander of the army has dedicated to all of the detachment's [combatants]. Or the detachment's horsemen's commander sends cavalry from his detachment [to get] another booty that he has sought, and he dedicates to them [the horsemen] an extra share taken from the detachment's extra share when he sees reluctance from them to seek the booty: 'What should the army's commander do about that?' He wrote: 'If the army's commander dedicates to the detachment one-fourth or less of extra share when he sends it out, he should give them what the detachment's commander dedicates to them as long as their extra share is up to one-third of what they acquire.'¹⁶⁸ It was said to him [al-Awzā'ī]: '[How about the case of] the Imām who resides with the army in a great village and he stays there several days, and a man brings to him goods that he acquires, takes a lamb and eats its meat and brings its skin to the collected booty, or enters a house and acquires in it goods that he brings to the Imām?' He replied: 'There is no extra share in this.' It was said to him: 'A detachment is sent [to the battlefield], and they face their enemy and fight them and put them to death and come back with their spoil. Is that [considered] the first booty?' He replied: 'Yes.'

Al-Thawrī said: "It has been narrated to us that the Prophet used to dedicate at the beginning [of a military campaign] one-fourth as an extra share of spoil, and when he returned, he used to dedicate one-third."¹⁶⁹ (Narrated to me by 'Alī from Zayd from him.) It was narrated to me from Mu'āwiya from Abū Ishāq that he said: "I asked Sufyān [al-Thawrī] about [the case of] the Imām who sends out a detachment and dedicates to it an extra share of spoil, but some of [the combatants] get lost on the road and do not meet each other except at the military camp, and each has acquired [booty]. He replied: 'I prefer that what is acquired be [divided] among all of them.'"

Al-Shāfi'ī referred to the Prophetic tradition on the authority of 'Abdullāh b. 'Umar that the Messenger of God sent out a detachment towards Najd, and they [the combatants] acquired booty [in the form of] many camels. Their shares were twelve camels or eleven camels. Then, they were given as an extra share (*nafl*) one camel each. And [al-Shāfi'ī referred to] the Prophetic tradition, on the authority of Sa'īd b. al-Musayyib, that he said: "The people used to be given the extra shares of spoil from the one-fifth [share]." Then, al-Shāfi'ī said: "The tradition of 'Abdullāh b. 'Umar indicates that they were given their share from what they acquired and that they were given the *nafl* of one camel each. And the *nafl* was something extra that was different from what they had [as a basic share]. And concerning the saying of Sa'īd b. al-Musayyab that '[they were] given the extra share from the one-fifth share,' he [al-Shāfi'ī] said: "this is from the one-fifth [share] of the Prophet because he [Prophet] deserved one-fifth of the one-fifth share from every booty. Thus, the Messenger of God used to put it as God showed him as he put all of his property. And what God showed him is what is

good for [all] Muslims.” He [al-Shāfi‘ī] said: “All of the one-fifth [share], except for the share of the Prophet, should be for those whom God named. A knowledgeable person should not be deceived into thinking that people who participate in [the battle] should come and take their share of property and [also] be given what belongs to others unless someone else volunteers to give it to them.” He [al-Shāfi‘ī] [also] said: “The extra share of spoil, based on this understanding, [should be given] from the share of the Messenger of God. Therefore, the Imām should wisely make a decision. If the enemy [combatants] are too many and their power is stronger and the number of Muslims facing them is lower, he should dedicate an extra share from it [the Messenger’s share] following the practice of the Messenger of God. If such [a situation] does not happen, he should not give an extra share. This is because most of the Messenger of God’s raids and his detachments did not have extra shares.” He [also] said: “Giving an extra share of spoil in the first raid, the second, and others are the same according to what I have described as making a wise decision [by the Imām].” He [also] said: “Some of the Syrians have narrated that the [amount] of extra share at the beginning [of the military campaign] and the return is one-third for one of them and one-fourth for the other. And the tradition of Ibn ‘Umar [indicates] that he [the Prophet] gave as an extra share one-half of the one-sixth share. Thus, this indicates that there is no limit to the amount of extra share that the Imām may not surpass. And most of the Messenger of God’s raids did not have extra shares of spoil. Thus, if the Imām has the right not to dedicate an extra share but he does, his dedication of a certain amount as an extra share should be based on a wise decision and not [necessarily] limited [in amount].” He [also]

said: "I do not know of any [tradition] that is authentic to us from the Prophet about that, i.e. if an Imām says if he sends out a detachment or an army before the engagement in battle: 'Whoever acquires any booty, it should be his after [taking] the one-fifth share.'" He [also] said: "I do not know the practice of the Messenger of God except what I have described of his division of the four-fifths among those who participated in the combat and four-fifths of the one-fifth share among his family and putting his own share where God had showed him, and that was one-fifth of the one-fifth [share]. And God knows best." He [also] said: "And this is [based on] the view which states that those [combatants] fought based on this condition. And God knows best." (Narrated to us from al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "Giving the extra share of spoil should be before [acquiring] the booty. The Imām should not dedicate anything as an extra share from the booty after it falls into the hands of Muslims. But if he wants to give an extra share, he should say so before they acquire the booty: 'Whoever acquires a captive will get his spoil.' Or [he] says: 'Whoever puts to death [an enemy combatant] will get his spoil.' Or [he] sends out a detachment and says: 'Whatever you acquire, you will get one-fifth of it, one-fourth of it, or one-third.' This is the *nafl*. So, whatever they acquire in front of them, he should pay them what he dedicates to them." They [also] said: "And if he dedicates [a certain amount] to them by saying, 'Whatever you acquire in such and such [battle], you will get its half or you will get all of it,' this is permissible for them [to take], and he should pay them that [amount]. This is preferred so that they will be more eager to fight and to inflict damage on the enemy." They [also] said: "There is no harm if the provincial governor says to a man: 'Whatever you

acquire from the polytheists will be yours.' Or: 'Whatever you acquire when overcoming [an enemy] will be yours.' This is also from the *nafl*. Thus, whatever he acquires or takes out [of enemy territory] by force, the Imām should allow him that." He [Abū Ḥanīfa] said: "If he does not dedicate anything to them, and if one of them puts an [enemy] person to death and takes his spoil, the Imām should not give it to him as extra spoil. And it is the same if he alone takes something by force; it should be a spoil for him and the army's combatants, and the Imām should not give it to him as an extra spoil." They said: "The same is [applicable] if a detachment or a group of people leave the army with or without the Imām's permission and they acquire booty; it should be [divided] between them and the people of the army, and it should not be particularly for them, and the Imām should not give it to them as an extra spoil." ([Narrated by] al-Lu'lu'ī from them.)

Abū Thawr said: "If the Imām says: 'Whoever acquires something, it will be his,' and [if] this is better for the people and it will encourage fighting and [inflicting] more damage on the enemy, it is permitted. And whoever acquires something, it should be his, and the one-fifth share should not be taken from it. The dedicated one-fifth share should not be taken from the extra shares and the spoils [of slain enemy combatants] unless the Imām makes a condition to them, saying: 'Whoever acquires something will get it after taking out the one-fifth share.' And the meaning of *nafl* is the same as taking the spoil of a slain enemy person. And God knows best. The Prophet dedicated an extra share of spoil at the beginning [of a military campaign] and the return, and Ibn 'Umar said, 'The Messenger of God gave us an extra share of one camel each,' and the extra share [should be given] before taking the one-fifth share. God knows best."

[Section 33.4]

They disagreed on the place in which the Imām is permitted to divide the booty.

Al-Awzā'ī said: "The Messenger of God did not return from any raid in which he acquired booty unless he took out its one-fifth share and divided [the remainder] [among the combatants] before he returned. Among these were the raids of the Banī al-Muṣṭalaq, Hawāzin, [and] the day of Ḥunayn.¹⁷⁰ The Messenger of God married Ṣafiyya in Khaybar when it was conquered by the will of God. Muslims continued doing [this practice] until the turbulence became strong after al-Walīd b. Yazīd was slain: No army among them would depart from the Byzantines' land until they had finished dividing their booties." (Narrated to me by al-'Abbās from his father from him.) He [also] said: "Abandoning the division of the Muslims' booties until they take them out from the Territory of War to the Territory of Islam is against the guidance of preceding Muslims from the time God sent his Prophet until now." It was narrated to me by Mu'āwiya from Abū Ishāq that he said: "I asked al-Awzā'ī: 'What do you think if a man buys an animal, a captive, or goods from the booty, then the enemy is able to take it after he received it? Should the value of what is bought be cancelled?' He replied: 'No, nothing more has happened than captives [escaping] from Muslim armies in the Territory of War, and their values are not cancelled.'" He [also] said: "And if he buys a concubine and she dies, it is [a loss] from his property."

Al-Thawrī was asked: "Is it permissible to sell booties in enemy territory?" He replied: "What prevents it from being permissible?" (This was narrated to me by Mu'āwiya from Abū Ishāq from him.) He [Abū Ishāq] said: "I

said: 'They say that because [the booty] has not yet been gained.' He did not respond."

Al-Shāfi'ī said: "If Muslims raid the enemy people's land using horses and camels, and they acquire as booty their land, houses, properties, and [enemy persons] themselves or some of that and not the other, the *sunna* in dividing it is that the Imām should divide it quickly based on his consideration for [the combatants]. If he has with him many [Muslims] in that place and feels secure from an enemy counterattack, he should not delay dividing it if he can in the same place where he acquired it as booty. And if it is a warring territory or he fears an enemy counterattack or his place is not well accommodating for Muslims, he should move to a place more accommodating for them and more secure for them from an enemy [attack], then he should divide it even if it is a land of polytheism. This is because the Messenger of God divided the properties of the Banī al-Muṣṭalaq and their captives in the same place where he acquired them as booty and before he moved from it, and every [place] around it was a land of polytheism. And he divided the properties of the [enemy] people of Badr in Sayar, several miles away from Badr. And the places around Sayar and their people were polytheists."¹⁷¹ He [also] said: "Most of what the Messenger of God and the commanders of his detachments divided from the booties they acquired [was done] in the Territory of War." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "It is not permissible for the Imām and the Muslims, when they acquire booty in the Territory of War, to divide anything from it until they bring it back to the Territory of Islam. This is because if one of the Muslim armies reaches them and they have already acquired booty,

they should share with them that booty. Thus, they should not divide [it] until they bring it to the Territory of Islam, and if they do divide it in the Territory of War, they are committing wrongdoing, but [the division] would be lawful. And if the Muslim army is with the Imām in the Territory of War and they need what is in the booty, be it clothes, goods, or animals, there is no harm if these are divided among them in the Territory of War. As for slaves, he should not divide any of them among [the combatants] until they [the slaves] are taken to the Territory of Islam. And he should not sell any part of the booty in the Territory of War until he takes that out to the Territory of Islam. But if he does divide that or sell it in the Territory of War, it is lawful.” ([Narrated by] al-Juzjānī from Muḥammad [al-Shaybānī] from them.)

Abū Thawr said: “If Muslims acquire booty and it falls into their hands while they are in the Territory of War, they may divide it if they want to do so. This is because it is now owned by them. The Imām should take out his one-fifth share and divide the rest between the army’s people. And the division [of booty] in the Territory of War and the Territory of Islam is the same. I do not know of any disagreement among jurists that if the booty falls into the hands of Muslims in the Territory of War, they may eat from it, wear the clothes, ride [the animals], and use any goods that they need from it. Thus, if this is [lawful] for them to do, it should be divided if they want to do so. The reason that the people delay its division until they go [to the Territory of Islam] is because it might distract them from the enemy.”

[Section 33.5]

They disagreed on hiring someone who takes out the booty to the Territory of Islam and to the place where [the booty] is divided and on hiring a guide by [paying him] from some of the acquired booty. And [they also disagreed on] the way the booty should be taken out to the place where it is divided.

Al-Awzā'ī said: "The Imām should give the shepherd and the guide [something] from the collective property [of Muslims]. And whoever hires a detachment to protect their booty until it is divided should give them their wages from their extra shares of spoil." (Narrated to me by al-'Abbās from his father from him.) He [the father of al-'Abbās] said: "He [al-Awzā'ī] was asked about [the case of] the Imām who hires [people] to herd cattle from the booty [by paying them from] the one-fifth share of spoil every day with a specific wage: 'What do you think if the enemy follows them and regains what is in their hands? Should the Imām be obliged to pay the wage of the people who have herded [cattle] and worked?' . . ." ¹⁷²

Al-Shāfi'ī said: "If the Imām transfers the acquired booty from its [original] place to another, and if he has pack [animals] with him, he should carry it on them. But if he has no [pack animals], the Muslims should carry it for him if they have with them pack animals without [charging] any payment. If they refuse to do so and he finds [pack animals] that can be rented, he should rent them to carry the booties, then he should pay for the rent and hire from all the properties [of the Muslims]." He said: "And if someone says: 'Those with him should be forced to carry one load [each from the booty],' it would be a [considered] opinion." He said: "And if he [the Imām] cannot find pack [animals] and the army does not carry it [the booty], he should divide [the booty] on the spot, and whoever wants may take his [share of] property." He [also] said: "And if

someone says, 'They should be forced to carry it by paying them the rent that is equal to the charge of hiring other [people] because this is a case of necessity,' it would be a [considered] opinion." He [also] said: "And if a detachment leaves an army and acquires booty, its case is as I have described about the army in enemy territory." He [also] said: "If the commander of the army or the detachment drives a group of war captives, worthless articles [from the booty], or something else, and the enemy reaches him and he fears that [the enemy] might take it from him, or it causes them to be delayed, what I do not doubt is that if he wants to put to death the men who have reached puberty, he may do that. But he should not put to death those who have not yet reached puberty or put to death the women among them or slay and slaughter the animals." (Narrated to us by al-Rabī' from him.) He [al-Rabī'] said: "It was said to al-Shāfi'ī: 'What do you think if the Imām takes all of the goods he collects and burns it in the land of polytheism while he is fighting, or he burns it when the polytheists reach him fearing that they might save it [from him] before it is divided or after it is divided?' He replied: 'All of this has the same ruling. If he burns it with the permission of those who are with him, he should not pay back anything to them and he should put away the one-fifth share for his family. And if the one-fifth share is given to him, he should pay them, but if it [the one-fifth share] is not given to him, he should not have to [pay] anything [to his family]. And if he burns it without their permission, he should pay them back if they want. The same applies to a Muslim man who burns [part of the booty]. He should pay back what he burns if he burns it after the Muslims have collected it. But if he burns it before it is collected, there is no liability on him [to pay it back].'"

Al-Thawrī said: "He [the Imām] may hire [someone to carry] the booty [by paying him] from it." (It was narrated to me by Mu'āwiya from Abū Ishāq from him.)

Abū Ḥanīfa and his companions said: "If Muslims acquire a lot of [booty] in the Territory of War and the Imām does not have with him extra mounts and camels on which to carry the booty, he should carry it on them with their owners' permission. And if they do not have extra [animals], the men and those who are able from the children and women [captives] should walk. But if they are unable to walk with them, the men should be put to death and the women and children released. And if among what the Muslims acquire as booty are mounts, camels, and sheep, they should drive them with them to the Territory of Islam. But if they are unable to drive them, they should slaughter the camels, sheep, and mounts and burn them with fire so that the enemy people cannot benefit from them. They should not hock the animals because this is mutilation. And if the booty that they acquire has weapons, goods, and many metal utensils and they do not have pack animals to carry all of that, they should burn it with fire and not leave it for the enemy people to benefit from." ([Narrated by] al-Juzjānī from Muḥammad [al-Shaybānī].)

[Section 33.6]

They [Muslim jurists] disagreed on the *sunna* of dividing booties.

Mālik said: "The one fifth-share should be [taken from] what is acquired by [raiding] horses and camels. For what was conquered by combat, such as Khaybar,¹⁷³ the Messenger of God took the one-fifth share of its [booty] and

divided the rest among those who conquered it. They were one thousand and eight hundred. The Messenger of God divided [the booty] into eighteen shares, and each hundred men had one share. Therefore, the one fifth-share should be taken from what the Muslims acquire through combat because it is conquered by using [raiding] horses and camels.” (Narrated to me by Yūnus from Ashhab from him.) He [Ashhab] said: “Mālik was asked: ‘When cities were conquered, did ‘Umar b. al-Khaṭṭāb receive the one-fifth share?’ He replied: ‘As for the property, nothing [was sent to him] but as for . . .¹⁷⁴ it might [have been sent], and as for slaves, I do not know.’ It was said to him: ‘What was done with the one-fifth share [of booties]?’ He replied: ‘Some of what was conquered did not have a one-fifth share. Khaybar and Syria were conquered and there was no one-fifth share [taken from their booties]. Did you see whether the slaves whom ‘Umar ordered to pay the poll tax were divided up and the one-fifth share [was taken] from them? There was no one-fifth share taken from them, and the slaves and the land were left without a one-fifth share taken from them. ‘Umar, therefore, took the one-fifth share from [moveable] properties and did not take the one-fifth share of land or slaves, and approved that for those Muslims who came after him. Some people talked to him about this and quarreled with him to take it and he left for the night. When he came back in the morning he said: ‘I thought about this matter last night and I found that God has already decided on this [matter], and I found to whom it belongs. God said,

For the poor emigrants who were driven out of their homes and properties. “And those who before them had homes and had adopted the faith,” then He said, “And those who came after them.” [Qur’ān, 59:8-10]

This property is for those [people].” Mālik said: “If during that time [the booty] was given to those [who fought in the battle], then from where could those who came after them find [anything]? I say this: If it were divided [among the combatants], no one who came after would gain anything, and those who participate in raids would have nothing and raiding would be abolished.”

Al-Awzā‘ī said: “Mecca used to be a Territory of War, before it was conquered [by Muslims], and God made His Messenger and the believers conquer it by force even though Muslim men lived there. He [the Prophet] did not take from them a house, a land, or a woman, and he gave the people a pledge of security and forgave them.” (Narrated to me by al-‘Abbās from his father from him.) It was narrated to me from Mu‘āwiya from Abū Ishāq that he said: “I asked al-Awzā‘ī: ‘What should the Imām do with the booties when he acquires them?’ He replied: ‘If he wills, he may divide them into five parts as five shares then order [the combatants] to draw lots on [parts of the booty]. If he wills, he may sell the booties and take out the one-fifth share. He should consider the [need] of the people in general.’”

Al-Thawrī said: “The booty, which is what Muslims acquire by force, should be [divided into] one-fifth and four-fifths for those who witness [taking] it. The one-fifth [share] is for those whom God named.” (Narrated to us by Abū Kurayb saying: ‘Narrated to us by Wakī‘ from him.’)

Al-Shāfi‘ī said: “All of what is acquired from the booty [taken] from the people of the Territory of War, whether small or large in number, such as a house, land, or something else from property and captives, should be divided up [among the combatants] except for [captured] adult men. The Imām may choose between

freeing those whom he chooses, or he may put them to death, ransom [them], or enslave [them]. And if he frees [them] or puts [them] to death, it is for him to decide. And if he enslaves [them] or ransoms [them], the way the enslaved or ransomed [are treated] is similar to the rest of the booty." He [also] said: "This is because if he takes anything from them [captives] for releasing them, and if there is a Muslim captive that he ransoms with two captives or more, it is for him to decide and the Muslims should not [object] against the one who ransoms Muslim captives with polytheist captives. And if he [the Imām] is permitted to free them [enemy men] without giving the Muslims any benefit that they may receive, freeing a Muslim captive is more beneficent and fitting to be permitted." He [also] said: "And about [the case of] an [enemy] man that is captured by a [Muslim] man and enslaved or a ransom is taken from him, there are two opinions: one of them is [to consider] what is taken from him, such as a property, as booty. And if he is enslaved, he should be similar to [the case of] children, and this is divided and a one-fifth share is taken from it and four-fifths of it should be distributed among the group who has witnessed [acquiring the booty]. It is not [only] for the one who takes him captive. This is the correct opinion, and I do not know of any authentic tradition against it. But it has been said that a man is different from [women and children] captives and property, because he may be put to death, and therefore, he should be given to the one who took him [captive]. And whatever is taken from him, it should be for the one who [captured him], similarly to the spoil of the one who puts him to death. This is because capturing him is harder than putting him to death. This is an opinion and God knows best." He [also] said: "The Imām should take aside the one-fifth [share] from what he acquires, after

what I have described in detail and keep four-fifths of it, and he should count all of the adult Muslim men who have participated in the combat and know all of those who participated [in the combat] from among the *dhimmīs*, Muslims who have not yet reached puberty, and women, and he should give them something from the spoil. And for the one who thinks that he should give them an extra share from the four-fifths [shares], he should, then, put aside for them their extra shares [before the booty is divided]. He [also] should know the number of horsemen and foot soldiers from among the adult soldiers who participated in the combat, and he should dedicate for a horseman three shares and for a foot soldier one share, and he should have the same [share] for a man and a foot soldier and they should be given one share each.” He [also] said: “And all of the shares of people of kin should be given wherever they are; no one among them who has participated in the combat should be preferred over another who has nothing except for his share in the booty, similarly to the share of people in general, nor is a poor person [preferred] over a rich person. And a man is given two shares and a woman one share, and it should be given equally to the young among them and the old. This is because they are given it in the name of kinship and to all of them the title of kinship is applied.” He [also] said: “If someone says: ‘The Messenger of God gave to some of them a hundred *wasāq*¹⁷⁵ and others less than that,’ it should be said: ‘This is his share and the share of his children.’” He [also] said: “If the division [of booty] is not mentioned in detail, it should be like the division of inheritance.” He [also] said: “And three-fifths of the one-fifth [share] should be distributed among those whom God named: the orphans, those in need, and the wayfarers in all of the Territory of Islam. They should be counted and then [the

booty] should be distributed among them [so that] each group of them receives its complete share. No one who deserves a share should be given another's." He [also] said: "The Messenger of God passed away and our jurists [afterward] disagreed on his own share. One of them said: 'It should be given back to the people who deserve a share and are mentioned by God [in the Qur'an]. This is because I saw Muslims say about [the case of] the one who deserves charity to whom a share is dedicated but cannot be found: 'It should be paid back to those who are named with him [as deserving charity].' This is a good opinion although the division of charities is different from the division of spoil." He [al-Shāfi'ī] said: "One of them [the early jurists] said: 'The Imām should put it [the Prophet's share] according to his opinion based on his thinking about Islam and its people.' One of them said: 'He [the Imām] should put it into [buying] horses and weapons.'" He [al-Shāfi'ī] said: "What I choose [from the opinions] is for the Imām to put it in every matter by which Islam and its people are fortified, such as closing the path from which an enemy attack is expected, preparing horses and weapons, or giving it to those who excel in [defending] Islam as an extra share of spoil during the war or not during the time of war to increase the strength of Islam and its people according to what the Messenger of God did with it [his share]. The Messenger of God gave to friendly non-Muslims, and he gave [from his share] extra shares of spoil during warfare, and he gave to a group of his companions, from the emigrants and the supporters, who were needy and were distinguished [Muslims] in the year of Khaybar, and most of them were poor. I think that all of that, and God knows best, [was given] from his share."

He [al-Shāfi‘ī] said: “And His [God’s] saying, ‘A fifth share is assigned to God,’ is the beginning of speech. Everything belongs to God. To God belongs everything and to Him ‘every matter belongs, in the beginning and the end.’”¹⁷⁶
(Narrated to us by al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “The Imām and Muslims should, when they acquire booty and take it to the Territory of Islam and the Imām wants to divide it up, divide the one-fifth [share] into three shares, for the orphans, the people in need, and the wayfarers. And he should divide the four-fifths among the army combatants who have acquired it. And if the Imām wants to sell all of that and divide its value, he should take aside the one-fifth share from that and divide it among the orphans, the people in need, and the wayfarers and divide the four-fifths of the value among the army combatants who acquired it. And if he wants to divide the share of spoil for the people of each banner alone, he may do that. All of the spoil should be appraised, such as mounts, weapons, sheep, cows, and slaves. The people of each banner should be given their share from all of that. The people of each banner should then share that among themselves. The best [way] is to sell all of it [booty] to someone who wants [to buy it] then divide its [value] among those I [Abu Hanifa] have already described by taking aside the one-fifth share and dividing it into three shares, and dividing its four-fifths [share] among those foot soldiers and horsemen who acquired it along with those who join them from Muslim armies while they are in the Territory of War and before they take it to the Territory of Islam.” They [also] said: “Whatever land Muslims conquer, the Imām has the choice, if he wills, to take its one-fifth [share] and divide its four-fifths [of share] among those who acquired it. And if he wants, he may make that

a taxed land (*kharāj*) and leave its people [living] there, paying its land tax and making it prosper as ‘Umar b. al-Khaṭṭāb did in the land of [Iraq].”

Bishr narrated from Abū Yūsuf from Abū Ḥanīfa that he [Abū Yūsuf] asked him: “What do you think if the Imām gives to half of the army, then the rest of the booty is lost or burned?” He replied: “The Imām should cancel the division and reassign it among the people again.” I asked: ‘What do you think if the Imām divides the booty in the Territory of War, then [another] army enters before they get out? Should the latter share, with those to whom the division has been made, what they already have taken?’ He replied: ‘No.’ I [Abū Yūsuf] asked: ‘What do you think if he gives only to half of the army, [then another army joins them]?’ He replied: ‘If he puts his hand on the division and gives only to one man and then a detachment enters [the Territory of War], they should not be given from that division because the Imām has already initiated its division.’”

Abū Thawr said: “If the Imām sells the booty and receives its value, the one-fifth [share] should be taken from it and divided into five shares.” He [also] said: “The saying [in the Qur’ān] ‘to God’ is the beginning of speech because everything belongs to God. The share of the Prophet is for the Imām to buy from it horses and weapons and to give to those in whom he sees strength for Islam and benefit for the Muslim people and a protection to them, [such as] the warriors or the people of knowledge, *fiqh*, and Qur’ān. And one share should be for the people of kin, who are the relatives of the Messenger of God, and they are the offspring of Hāshim and the offspring of al-Muṭṭalib, to [maintain] a social bond with them. The rich among them and the poor, the male and the female, are the same in [taking it]. This is because God has assigned this [share] to them and the

Messenger of God divided it among them, and we do not know about him that he preferred some of them over others. And I do not know that there is any disagreement among jurists that if a man bequeaths one-third of his property to the offspring of a person, and they can be counted, that among them the male and the female and the young and the old should have the same [share] in it, without preferring some over others. Therefore, everything that is given to a group of people should be [divided] among them equally unless the one who orders such a [division] explains [the exact way of distribution]." He [also] said: "Only the poor among the orphans and the wayfarers should be given [any share] because this is a consensus [among scholars]. And one share for Muslim orphans, one share for the Muslim needy, and one share for the Muslim wayfarer. And four-fifths [of the booty] should be divided by the Imām among those adults who have participated in the combat." He [also] said: "The Imām should sell all of what he acquires except [enemy] combatants. The Imām should look into their fate and do whatever is better for the Muslims, such as ransom, putting to death, or enslavement." He [also] said: "As for lands, they disagreed on [their status]. Some of them said, 'It should be divided as the rest of the booty is divided.' This is the opinion of Abū 'Abdullāh and I say the same."

Abū al-‘Āliya al-Riyāhī said: "The Messenger of God used to be given booty, and he divided it into five [shares], four-fifths of which was for those who witnessed its [acquisition]. Then, he would take the one-fifth [share] and strike with his hand [through the spoil] and take from it what his hand held and dedicate that to the grand mosque in Mecca (*ka'ba*), and this is God's share. Then, he would divide the rest into five shares, and it would be one share for the

Messenger, one share for the people of kin, one share for orphans, one share for the needy, and one share for the wayfarer.” (Narrated to us by Abū Kurayb saying: “Narrated to us by Wakī‘ from Abū Ja‘far al-Rāzī from al-Rabī‘ b. Anas from Abū al- Āliya.”)

Ibn ‘Abbās said: “The booty used to be divided into five [shares]. Four of them were for those who fought over it, and [the remaining] fifth would be divided into four shares. The [first] fourth would be for God, His Messenger, and people of kin, meaning relatives of the Prophet. Whatever was for God and the Messenger would be for relatives of the Prophet. The Prophet would take something from the one-fifth [share]. The second fourth would be for orphans. The third fourth would be for the needy. The fourth fourth would be for the wayfarer, which is the group of poor [people] who stay with Muslims [for a while].” (Narrated to me by Abū ‘Uthmān b. Şāliḥ saying, “Narrated to us by ‘Abdullāh b. Şāliḥ from Mu‘āwiya b. Şāliḥ from ‘Alī b. Abī Ṭalḥa from Ibn Abbās.”)

[Section 34]

The scholars of *siyar* unanimously agreed [based on] a tradition from the Messenger of God that he used to take for himself, from the whole booty, a chosen [property] that he dedicated to himself. For example, he would take from it a sword, a concubine, or a precious thing [from the booty], and it would only be for him and not for the army [combatants] who raided and engaged in warfare. This was for him [to choose] whether he participated in the battle or not.

[Section 34.1]

They disagreed on [the status of] this chosen [property] after his time.

Abū Bakr al- Ṣiddīq said, when Fāṭima said to him: “Do you inherit from the Messenger of God or does his family?”: “I heard the Messenger of God say, ‘If God gives a prophet something, it should be for the one who is responsible for the affairs [of Muslims] after him.’” (Narrated to us by Abū Kurayb saying: “Narrated to us by Ibn Fuḍayl from al-Walīd b. Jamī’ from Abū al- Ṭufayl from Abū Bakr.”)

Al-Shāfi‘ī said: “It should be returned for the interests of Muslims.” (Narrated to us by al-Rabī’ from him.)

Abū Ḥanīfa and his companions said: “The booty is divided into five [shares]. Four-fifths are for the army [combatants] and one-fifth is divided into three [shares] among orphans, the needy and the wayfarer.” ([Narrated by] al-Juzjānī from him.)

Abū Thawr said: "It was narrated that the Prophet used to get a chosen [property] from the booty. Thus, if the Prophet did that and it was after the [Qur'ānic] rule on dividing the booty had been revealed, the Imām should take it similarly to what the Prophet used to take, and he [the Imām] should dedicate it as the Prophet's share from the one-fifth [share]. But if there is no proof [of the Prophetic practice], the Imām should not take anything from it. And God knows best."

[Section 35]

They [Muslim jurists] agreed unanimously that if women and children are captured and taken to the Territory of Islam, they should be [considered] booty and that if the army [combatants] have enslaved them and faced their [enemy] combatants in a desert land that is not owned by them [the Muslims], the Imām should not honor them [with manumission].

[Section 35.1]

They disagreed on the permissibility of ransoming them with their men and selling them to disbelievers and on the rule concerning the combatants among them.

Mālik said: "This is for the Imām. If he wills, he may put them to death or if he wills, he may ransom with them Muslim captives. (Narrated to me by Yūnus from Ibn Wahb from him.) Yūnus narrated to me from Ibn Wahb that he said: "I heard Mālik [saying], when he was asked about [the case of] a man who buys slaves, from among the non-Arab Africans and Cyprians, and he wants to sell them to Christians before they embrace Islam: 'I do not know of any prohibition [concerning this case], but I do not like that anyone does it.'" He [Ibn Wahb] said: "He was asked about [the case of] a man who buys a Cyprian and a Zoroastrian black man. 'Should he compel them to embrace Islam?' He replied: 'Those are not Zoroastrians. The Zoroastrians are the ones who [live in] the East, the Persians. But those, their religion is not known.'¹⁷⁷ It was said to him: 'Should a man compel this slave to embrace Islam if he buys him?' He replied: 'Yes, he should compel him to be a Muslim.'"

Al-Awzā'ī was asked about the [male] captive: "Do you prefer that he be called upon to become a Muslim before he is put to death?" He replied: "He may put him to death if he wants. And if he wants, he may inform him about Islam, and if he embraces Islam, he becomes a slave for Muslims. And if he wants, he may free him, and if he wants, he may ransom with him Muslim captives." (Narrated to me by al-'Abbās from his father from him.) He [the father of al-'Abbās] also said: "Al-Awzā'ī said: 'Muslims used to see no harm in selling women [slaves] to the enemy people, and they disliked selling [slave] men unless for ransoming with them Muslim captives.'" It was narrated to me from Mu'āwiya from Abū Ishāq that he said: "I asked al-Awzā'ī about captives, from among the Byzantines and the Cyprians, who are acquired, either children or adults. He replied: 'If you acquire a child from the Byzantine captives, you should not sell him to *dhimīs*, and if you acquire [a person] from among the Cyprians, Ethiopians, or Turks who does not have a religion that he recognizes, but his religion is such that whatever you invite him [to believe in], he will respond to you [with affirmation], then he should be [considered] a Muslim. And if you own him, do not sell him to them. And any adult that you acquire, you should invite him to Islam and teach him. And if he refuses, you may sell him to them if you want. And his [conversion to] Islam is for him to say, 'There is no god but God.' I asked: 'What if he says it only with his tongue but he does not know [its meaning] in his heart?' He replied: 'If he says it, he is a Muslim, and then you teach him [about Islam] afterward.'"

Al-Thawrī said: "The Imām has a choice concerning the captives of the polytheists. If he wants, he may put them to death. If he wants, he may ransom

with them. If he wants, he may free them, and if he wants, he may enslave them.”

(Narrated to me by ‘Alī from Zayd from him.)

Al-Shāfi‘ī said: “If polytheists are captured, and they fall into the hands of the Imām, there are two rules [concerning their case]. As for adult men, the Imām, if he wants, may put all or some of them to death or free all or some of them, and he is not obliged to pay anything for what he does concerning that, whether the people in general capture them or only one of them does, and whether they [the Muslims] follow his [Imām’s] order [to capture them] or a provincial governor captures them.” He [also] said: “He should not put them to death except out of consideration for the Muslims’ [interests], such as strengthening God’s religion and weakening His enemies and their anger. But putting them to death is lawful in any case. And he should not honor them with manumission unless he sees a reason related to the one who is freed, such as hoping for his conversion to Islam or restraining the polytheists and weakening them in any way possible. And if he does that, not based on the above reasons, I would dislike it, but he does not have to pay anything. He also may ransom Muslims with them. If he has the right to honor manumission without ransoming [Muslims], having the right to ransom should be more plausible.” He [also] said: “And whoever enslaves [a person] from them, takes [a property] from them, or takes a ransom from them, it is like a property that Muslims acquire as booty. It should be divided among them and the one-fifth share is taken from it.” He said: “As for those other than adult men and women, if they are captured, however the capture was done, they should be [considered] as an acquired property in the booty. He does not have the right to leave behind any of them or put them to death. And if he does, he should pay back

their value. The same [rule applies] to any of the soldiers other than him [the Imām]. If he does [that], he should pay back what he has consumed and destroyed from [the properties].”

He [al-Shāfi‘ī] said: “Whoever among the polytheists is captured and then embraces Islam, his [conversion] to Islam prevents his blood from being shed, but his [conversion] to Islam does not lead him to be freed from enslavement if the Imām thinks that he should enslave him.” He said: “There is no harm if Muslims give the polytheists an enslaved [person] even if he has embraced Islam, if the [polytheists] who take him do not subject him to enslavement. I apply, in this case, the Prophetic tradition on the authority of ‘Imrān b. Ḥusayn that the Prophet ransomed two Muslim men with al-‘Uqaylī who had embraced Islam.”¹⁷⁸ He [also] said: “The Prophet ransomed two men with this al-‘Uqaylī who had embraced Islam, and he [the Prophet] returned him to his country, although it was a land of disbelief, because of his knowledge that they would not hurt him nor oppress him due to his high status and honor among them.” He [al-Shāfi‘ī] said: “And if a man embraces Islam, he should not be returned back to people who overpower him and hurt him unless he is in the same state as al-‘Uqaylī.” (It was narrated to us by al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “If Muslims besiege a city, a fortress, or army combatants from the enemy, and Muslims capture them and overcome the enemy combatants, and the provincial governor is with Muslims in the enemy territory, and then captives are brought [to him], [in such a case] if he wants to invite them to Islam, he may do that. And if he does not invite [them to Islam], there is no harm [in doing that] because the invitation has already reached

them. And if he wants to put to death all of the male captives, he may do that. And if he thinks that he should honor [their life] by treating them as spoils [of war] and divide them among the Muslims, he may do that. The Imām should look into which of these [decisions] is best for the Muslims. If their putting to death is better for the Muslims and more harmful to the enemy, then he should put them to death. And if he prefers to treat them as spoil and divide them among the Muslims and thinks that it would be better [for the Muslims], he should do that. But if he thinks that he should put them to death, he should not put to death those among them who are elderly, crippled, blind, injured, chronically ill, women, or boys. They should become spoils [of war] for Muslims in any state, whether they embrace Islam or not. They should be divided with the booty.” They [also] said: “There is no harm if captives are sold, whether they are men or women, to *dhimmīs* and to Muslims. They should not be sold to enemy people. There is no harm if children from the capture are sold. If they are captured with [their] fathers and mothers, they should be sold with [their] fathers and mothers to *dhimmīs* and to Muslims, and they should not be separated from each other. They should not be sold to enemy people if they have embraced Islam.” They [also] said: If the polytheists capture free Muslim people, from among the Muslim army combatants, and then Muslims acquire booties from the enemy in that war front and with these [booties] are slaves and goods, but those captured Muslims remain in the hands of the polytheists, the Muslims’ provincial governor should ransom those captives who are in the enemy’s hands from the booty that Muslims have acquired by ransoming them with the captives who are in the Muslims’ hands. They might also use the goods and properties they have acquired until they save

them from the polytheists' hands. They should ransom them with these [slaves and properties] unless the booty has been divided up. If the booty has been already divided, he should ransom them [by paying] from the Muslims' treasury office. But if the enemy refuses to accept ransoming them except with the slaves among them who have been captured [by Muslims], the Imām should take the slaves from those who have acquired them and ransom with them [Muslim captives], and he should reimburse their value to those from whom he took them to make them satisfied."

Bishr narrated from Abū Yūsuf that he said: "Abū Ḥanīfa said: 'No one among the polytheists should be returned to the Territory of War if they have been subjected to capture [by Muslims]. They should not be [given] to ransom [Muslims] and they should not be sold'." He [also] said: "Abū Yūsuf said: 'As for the sale, they should not be sold to them. But the Imām may ransom Muslims with them.'"

Abū Thawr said: "The Imām may sell all of what he acquires except combatants. The Imām should look into their status, and whatever is better for Muslims, he should do, whether ransom, putting to death, or enslavement. Abū Bakr al-Ṣiddīq used to not ransom [Muslim captives] with a polytheist captive even if he were given such and such *mudds* of *dīnārs*."¹⁷⁹ (Narrated to us by Abū Kurayb saying: "Wakī' narrated to us from al-Ḥasan Ibn Ṣāliḥ from Layth from al-Ḥakam from him.")

'Aṭā' and al-Ḥasan said: "A captive should be either honored [with manumission] or given as a ransom [to free Muslims]" (Narrated to us by Abū Kurayb saying: "Wakī' narrated to us from Sufyān from Ash'ath from 'Aṭā' and

al-Ḥasan.”) The reason for the one [who said], “Polytheists may be given as ransom even if she is a woman,” is what Abū Kurayb narrated to us saying, “Wakī’ narrated to us from ‘Ikrima b. ‘Ammār from Iyās b. Salama b. al-Akwa’ from his father that he said: ‘I raided with Abū Bakr [the tribe of] Hawāzin at the time of the Prophet, and he gave me, as an extra share of spoil, a concubine from the offspring of Fazāra, that was one of the prettiest Arab women. On her was a *qash*¹⁸⁰ whenever she took off her garment. [I took her with me] until I came to Medina. When I came to Medina, where the Prophet was, he sent for me and said: ‘May God [have mercy on] your father. Give her to me [as a gift] and I gave her to him.’ He said: ‘He sent her away to ransom Muslim captives living in Mecca.’” The reason for the one who rejects giving polytheists as ransom is because this would help the polytheists, and all [jurists] concurred on the prohibition of selling weapons and horses to them and that [doing] this would help them. The same [rule applies to] all that can provide them with help.

[Section 35.2]

Mālik said, according to what Yūnus narrated to us from Ibn Wahb from him, and al-Awzā’ī according to what al-‘Abbās narrated to me from his father from him, al-Thawrī according to what ‘Alī narrated to me from Zayd from him, and al-Shāfi’ī according to what al-Rabī’ narrated to us from him, and Abū Ḥanīfa and his companions, and Abū Thawr: “If the polytheist captives embrace Islam after the Imām has overcome and enslaved them and divided them among the army [combatants], their [conversion to] Islam does not emancipate them from enslavement.”

Mujāhid said: “If the people who have been [captured by] force embrace Islam, they should be [considered] free and their properties should be [considered]

as] spoil for Muslims.” (Narrated to us by al-Rabī‘ from al-Shāfi‘ī from Sufyān from Ibn Abī Nujayḥ from him.)

[Section 35.3]

They [Muslim jurists] disagreed on the rule concerning what the polytheists acquire from Muslim properties or someone who joins them then Muslims acquire them back.

Mālik said, concerning what the enemy acquires from the properties of the Muslim people, “If it has been saved before being divided, it should be returned to its owner. As for what has already been divided, it should not be returned to anyone, as it has already gone into the collected booties.” (Narrated to me by Yūnus from Ibn Wahb from him.) He [Ibn Wahb] said: “Mālik said, concerning [the case of] a man whose slave the polytheists have acquired and then Muslims take him as booty, ‘His owner has the right to [acquire] him unless he is included within the collected booty. If the booties have been divided, I do not see any harm if he [the owner] gets his value if he wants.’” He said: “Mālik said, concerning [the case of] a man who recognizes the [slave] mother of his child in Byzantine territory, and the booty has already been divided into five portions and those who deserve extra shares have received their shares and the people [in general] have received all of what belongs to them, ‘I do not think that she should be enslaved, and I think that the Imām should ransom her for her master. But if he does not do that, I think that her master should ransom her and he should not leave her. And I do not think that the one who acquired her should enslave her, and he should not consider it lawful to have intercourse with her because she is similar to a free woman, and because the master is obligated to ransom her if she has been injured.

This is a similar [case]. He does not have the right not to save the mother of his child, when she would be enslaved [thus] making intercourse with her lawful.' He [Mālik] said: 'And if he does not have anything with which he can ransom her, it becomes a loan that he is responsible for.'" He [Ibn Wahb] said: "Mālik was asked about [the case of] a slave who escapes to enemy territory and the enemy takes him, then God helps Muslims to acquire him as booty: 'Do you think that [his case] is similar to slaves that Muslims capture or similar to the goods they take : should these be given back to their [original] owner before the division and prevented from being taken after dividing up [the booty]?' He replied: 'The slave that is captured and the one who escapes are the same if they have been put in the collected [booty]. The latter is very much similar to the former in being put with the collected [booty]. He should not be given back to his [original] owner.'"

Al-Awzā'ī said about [the case of] a slave who escapes to enemy territory: "If he is taken [by Muslims] before he enters into one of their fortresses, he should be returned to his master. But if he enters a fortress and is captured, he is similar to the fortress' people. He should be included with the spoil." (Narrated to us by al-'Abbās from his father from him.) He [the father of al-'Abbās] said: "He [al-Awzā'ī] was asked about [the case of] a slave who escapes to enemy territory and marries there and has children, then Muslims acquire his offspring. Then, the slave asks [Muslims] for a pledge of security and is secured. He afterwards brings his offspring. Then the master catches the slave: 'What should he do with him and his offspring? Should the master be given control over his slave and the latter's offspring or not?' Al-Awzā'ī said: 'He should not be given control over him and

his offspring because he entered [Muslim territory] with a pledge of security and therefore he should be secure.’”

Mu‘āwiya narrated to me from Abū Ishāq that he said: “I asked al-Awzā‘ī: ‘What do you think about the goods of Muslims that the enemy acquires which are then later acquired back by Muslims?’ He replied: ‘Whatever is acquired from that, such as a slave, a mount, a concubine, or goods, and it is said that it belonged to so and so and that is clearly known, it should not be divided up [as booty]. And if its owner is absent, it should be put in the one-fifth [share]. And if it has been [taken] as a rented property, the one who rented it should pay the rent until he returns it to him [the original owner]. And if no one comes and claims it and no specific owner is known for it, it should be put in the collected booty. And if its owner comes [back] before it is divided up, he may take it [back].’” He [Abū Ishāq] said: “He also said: ‘I think that his slave should be returned to him unless his price has been divided up. And if he comes after he has been [included in] the collected [booty], he may get his value if he wants.’ I asked: ‘What if his [original] owner says to the one who acquired him [as booty], “I take his price, but wait for me for a few days”?’ He replied: ‘This is not for him [to decide] except if the one who has him in his hands wants [to do so]. If his [original] owner wants him, let him pay him his price and take his property. Otherwise, he does not deserve anything.’ It was said: ‘What if they disagree on the price and the buyer says, “I bought him with one hundred,” and his owner says, “You bought him with fifty,” and the price of the slave does not reach what the buyer says?’ He replied: ‘I think that what the buyer says holds.’ I asked: ‘If a man buys a concubine that the enemy has acquired [from Muslims] and she stays with him

for awhile, then her [original] owner comes and her price has increased or decreased, should he take her [back] at the same price for which he bought her or for her price on the day that he wants to take her back?' He replied: 'For the price for which he bought her.' I asked: 'Should he return any extra [money] if he had intercourse with her?' He replied: 'No. He had intercourse with her while she was lawful to him.' I asked: 'What do you think if Muslims acquire her and she already had a child from an enemy [man]?' He replied: 'A concubine should be returned to her [original] master unless she was included with the collected [booty]. And her child and whatever property that she gained as a gift should be put in the Muslims' [booties]. And if they acquire her while she is pregnant, what is in her womb should be [treated as] one of her organs unless she delivers [her child]. Thus, she and what is in her womb should be returned to her [original] owner unless she is included within the collected [booty].' I asked: 'What if the enemy acquires him [slave] and with him is a property that he earned while he was with [the enemy] through his hand labor?' He replied: 'I think that his property that he earned through his hand labor should only be for his master, in addition to the slave himself. And if he earned a property through his hand labor, then he paid the enemy to buy [his freedom] and then came back, [the Imām] should return him back to his master. And if a slave passes by a property owned by the enemy and he acquires it then comes back, he should receive a small portion of it as a gift and the rest of it should be for the Muslims. And if Muslims conquer an enemy fortress and they acquire in it slave men and women who had been owned by Muslims but they converted to Christianity, and the Muslims acquire with them properties that they earned while living with them, then Islam

should be conveyed to them. The one who embraces Islam should be returned back to his master if he comes before he is included in the collected booty. And if he refuses, he should be put to death.¹⁸¹ And their properties and what they earned while living with them and their children should be put in the Muslims' collected booties." He [the father of al-'Abbās] said: "I asked him about enemy [combatants] if they raid the Muslims' territory and they acquire a slave or a mount for a Muslim, and then [Muslims] chase them and save [the slave] from their hands before they are able to take him into their territory: 'Should he be included in the collected booty?' He replied: 'No.' I asked: 'Should he be given to the treasury office until his owner comes?' He replied: 'Yes.' I asked: 'What if he comes [to take him] after he has already been included in the collected booty?' He replied: 'He should take him, and the buyer should get [his price] from his owner.' I asked: 'What if the army combatants have already left?' He replied: 'His price should be returned to his [original] owner.' It was said to him: 'What if they [enemy combatants] acquire a Muslim, a *dhimmi*, or a Christian slave, and then the Muslim's brother or the slave's master goes to them, after getting a pledge of security, while they are on land or in the sea, and he ransoms his brother or his slave with a hundred *dīnārs* or with another slave for him, a Christian, or he keeps him [with them] as a trust until he brings to them a ransom. He later receives his brother or slave and they receive [the payment] from him. Then Muslims chase them and acquire that [person] from them before they reach their territory and safe place with him or after they take him to their territory.' He replied: 'If that with which they ransom [the slave] is [taken] from the people's property, he should be put with the Muslims' collected [booties], but if it is taken

from his property, he should be given to him. This is because it is incumbent on Muslims to ransom him from their spoil rather than his property. Thus, if he carries [the expense] from his property rather than theirs, it is more plausible that he be returned to him if he himself has acquired him.' It was said to him: 'What if a Muslim faces enemy [combatants] in their territory and is afraid of them before he intends to fight them, so he makes a truce with them with the provision that he give them his weapon and mount so thatso that they do not attack him? They do that, then Muslims save him from their hands afterward.' He replied: 'It is the same as the first [case].' It was said to him: 'What if a captive in their hands gives them a covenant that if they set him free, he will send them a ransom of a thousand *dīnārs*? They do that, then Muslims acquire him.' He replied: 'It is the same as the first [case].' It was said to him: 'A Muslim gives the enemy a gift or sells to them a Christian slave, or he buys from them a Christian slave and pays them with a mount or a property and they receive that and acquire it, then Muslims capture it. [What would be the rule concerning this case?]' He replied: 'Nothing among that should be returned to its [original] owner, and it should be put in the Muslims' collected booty. And if its owner comes [to declare it] before it is divided up, it should not be returned to him.' I asked him: 'A fortress is approached by Muslims, or the Muslims are in ranks and the enemy in ranks, then Muslims shoot at them with arrows. Some fall down inside the fortress, on the fortress' wall, or hit the fortress then fall on the ground or fall in the enemy's ranks. Then God helps the Muslims to conquer [the fortress]. [What would be the rule concerning this case?]' He replied: 'Whatever is acquired from that, in the place where the enemy has more control, whoever recognizes his arrow should

take it. And whatever from that is not recognized should be put in the Muslims' collected [booties]. I asked: 'Should not what is not recognized from that be considered as a lost property that needs to be claimed by someone (*luqta*)?' He said: 'No, but it is considered similar to the goods of Muslims that the enemy has acquired because it was in their fortress and in their hands.' I asked: 'Should anyone who recognizes his arrow and takes it sell it if he wants, or is that disliked because he has [already] used it to be nearer to God?' He [al-Awzā'ī] disliked that he sell it but [preferred that] he put it in its case so that he can shoot with it again. He [al-Awza'i] said: 'Whatever is found from what Muslims mostly control, and no one recognizes it [as his], let him [the one who finds it] give it as a charity to the one who needs it more than him, and he should not take it as his [own] property.'"

Al-Thawrī said: "If the enemy acquires something from Muslims' properties and takes it [to the Territory of War] and later Muslims capture it, then if its owner claims it before it is divided up, he has the right [to take it]. And if he acquires it after it has been divided up, he has the right to get the value of the price for which he bought it if he provides the proof that it was his property. And if the enemy acquires something that belongs to a [Muslim] man and then [another] Muslim man buys it from the enemy, and then he [original owner] provides proof that it was his property, he should take it back by paying the same price for which the [other] man bought it from the enemy. If he does not take it by paying that price, it should be for the one bought it."

He [al-Thawrī] said: "If the enemy captures a Muslim slave that belongs to a Muslim and then a Muslim man buys him and emancipates him, he [the original

owner] does not have any right [to enslave him]. It is considered an [illegal] acquisition. And if it is a concubine that a man buys and with whom he has intercourse and she delivers [a child] from him, her [original] master has nothing [concerning her]. And if a free man, a *mukātab*, or a [slave] mother of a child is captured [by the enemy] then another [Muslim man] buys them, they should not be enslaved. The *mukātab* should be returned to his master and the [slave] mother of a child to her master. As for the free man, he does not have anything of [captivity] against him unless the captured person requests from him to buy him [from the enemy]. Or if the *mukātab* requests from him to buy him, then the *mukātab* would be in debt [to pay the buyer his price]. As for the mother of a child, she is not obligated for anything even if she requests from him to buy her.”

He [also] said: “If a slave escapes to the enemy and Muslims capture him later, his owner has the right to [take] him whether he was included within the collected [booty] or not and without paying any price.” (Narrated to me by ‘Alī from Zayd from him.)

It was narrated to me by Mu‘āwiya from Abū Ishāq that he said: “I asked Sufyān [al-Thawrī] about the goods of Muslims that the enemy acquires and which are then captured by Muslims, and their owner finds it in the hands of a man who has bought it from the enemy or from the collected [booty], or he has gained it as a share from the [booty]. He replied: ‘If the one who has it in his hands provides proof that he bought it, its [original] owner should receive its price. But if he gained it as a share, he [the original owner] should receive its value.’” He [Abū Ishāq] said: “Al-Awzā‘ī said the same.”

He [Abū Ishāq] said: "I asked Sufyān [al-Thawrī] and al-Awzā 'ī about a slave who escapes to the enemy, then Muslims capture him. They said: 'He and what the enemy captures [from property] are the same.' He [al-Thawrī] said: 'If the buyer and the commodity's [original] owner disagree on the price for which he bought it, the final say should be for the buyer.' He [also] said: 'If a man buys a concubine that the enemy has captured, then her owner comes and [her value] has increased or decreased, he may take her back by paying the original price when she was included within the collected [booty].' I asked: 'Should he [the buyer] return her dowry with her [to the owner] if he had intercourse with her?' He replied: 'No. Having intercourse with her is an [expected] consumption. Do you not think that if she has become blind, lost an eye, or become sick, it would be said to him: "If you want you may take her, or if you want you may leave her"?' I asked: 'What do you think if he buys her and with her a child that [she delivered] from [having intercourse with] an enemy [person]? May he have intercourse with her if he wants even though he already knows her [original] master?' He replied: 'There is no harm [in doing so]. If her master comes, he may take her if he wants [by paying] her price. And if Muslims capture her and with her is a child from [an enemy person] and her master comes [to claim her] before she has been given as spoil, she and her child should be returned to her master.'"

He [Abū Ishāq] said: "I asked Sufyān [al-Thawrī] about the goods, the mount, or the slave for a Muslim which the enemy acquires, then Muslims capture it later. He replied: 'They should share it as booty.' I asked: 'May they share it even though they know that it belongs to a Muslim?' He replied: 'Yes, if its owner does not come [to claim it].' I asked: 'Is there any disagreement on

dividing it [as booty]?' He replied: 'No, is not most of what they acquire from booty like that? If its owner comes before it is divided . . .¹⁸² And if he comes [to claim it] after it has been divided up, he should take its price if he wants it.' I asked: 'What if it is known that he is a slave to so and so, and two men testify on [the man's ownership] but he is absent, or the slave says, 'I am a slave of so and so?' He replied: 'He should be given as spoil and he should not be believed [in what he says].' I asked: 'Should he be given more time?' He replied: '[Yes], if his master is with the army or nearby. Otherwise, he should be given as spoil.' I asked: 'What if the slave is sold where the booty is divided, then his master comes before the price is [paid] and divided?' He replied: 'He should bring his price and submit it, and he may take his slave.' I asked: 'What if the enemy raids Muslim territory and they capture a slave or a mount for a Muslim, and then Muslims chase them and save it from their hands before they can take it to their territory, and they [the Muslims] sell it as part of the sold booties, then its owner comes [to claim it] and it has already been given as spoil?' He replied: 'He should take it without [paying] a price because the enemy did not take it [to their territory].'"

Al-Shāfi'ī was asked about the enemy to whom a slave escaped, or a camel ran away towards them, or they [the enemy combatants] raided and got them, or they had owned them: "Is there any difference between their [cases]?" He replied: "No." It was said to him: "What do you think of them if Muslims take control of them and then their owner comes before they are given as spoil?" He replied: "They should be [given back] to their owner." It was said: "What do you think if they have already been included in the collected [booties]?" He replied: "Jurisconsults have disagreed on [this case]." It was said: "What do you choose

from among these [opinions]?” He replied: “I ask God for guidance regarding [this case].” It was said: “Which of the two opinions corresponds to traditions and analogy (*qiyās*)?” He replied: “The authoritative practice, according to my opinion, indicates, and God knows best, preference to the view of the one who says: ‘He should be for his owner before and after the division [of booty].’ As for analogy, it also supports [this view] without doubt.” He [al-Shāfi‘ī] said: “Based on this opinion, therefore, if the enemy captures a concubine belonging to a [Muslim] man, and then the one who acquires her has intercourse with her and she delivers [a child], then Muslims capture her, she and her children belong to her owner. But if they [the enemy people] convert to Islam, the concubine should be given back to her [original] owner, and the one who has had intercourse with her should receive her dowry and the value of her children on the day they were born.” He used as evidence the Prophetic tradition on the authority of ‘Imrān b. Ḥusayn.¹⁸³ (Narrated to us from al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “If a concubine of a Muslim man is captured by the enemy and she is given to one of them, then he emancipates her, she is [considered] free, and there can be no claim to [enslave her again]. The same holds if he has intercourse with her and she delivers a child from him, then Muslims acquire her and her child: she and her child are [considered] free, and there can be no claim [of enslavement] over her. The same holds if the one from the enemy who captured her makes a conditional agreement to free her, then Muslims acquire her, she is [considered] free with no claim [of enslavement] over her. And if the one who acquires her sells her to an enemy person, the sale is lawful. And if Muslims acquire her and then her [original] master comes when

she is put with the booty but before she is given as spoil, he has the right to [take] her. And if she has been given as spoil, he has the right to receive her price. And if she is in the hand of a man from the enemy and he gives her as a gift to a Muslim merchant who enters [their territory] with a pledge of security, he [the original master] should receive her price. And if the merchant sells her to a Muslim man before her [original] master comes [to claim her], the master from whom she was captured [by the enemy] should receive the price which the buyer paid. And if a Muslim man enters the Territory of War with a pledge of security and he buys her from the enemy, then he takes her out to the Territory of Islam and her [original] master comes to get her, he has the right [to receive] her price. And if her [original] master does not come until the enemy captures her again from the hands of the one who bought her, then Muslims acquire her, the one who bought her last has the right [to keep her] without [paying] anything if she is among the booty but not yet given as spoil. And if she becomes his without [paying] anything and then the first [master] from whose hand she was captured comes [to claim her], the latter should get her from the one who acquired her [by paying] the price for which he bought her the first time. And if no one among the two comes asking for her, and she is put with the booty until she is given as spoil and is included in the share of a Muslim man, then the first and the second men come asking for her, the last among the two has the right [to keep her] [by paying] her price. But if he does not ask for her, the first one does not have over her any claim [of mastership]. And if the second takes her [by paying] her price then the first comes asking for her, he [the latter] may get her by paying the price and value for which he had bought her in the first place. And if a concubine of a

Muslim man is captured by the enemy and she belongs to a man among them, and he has intercourse with her and she delivers children from him, then Muslims acquire her and her children, then the one from whose hands she was captured has the right to [take] her and her children without [paying] anything if she and her children are among the booty and they have not yet been given as spoil. And if they have been given as spoil, he has the right to [pay] their price. The same holds if she is pregnant and delivers [a child] while she is among the booty. And if they are given as spoil and she becomes part of the share of a Muslim man before she delivers, then she delivers a child while she is [living] with the one of whose share she became a part, then the one from whose hands she was captured may take her and her child [by paying] her price only, according to what she was priced when she was made part of his share. And if the one from whose hand she was captured does not come asking for her until she becomes blind while [living] with the buyer, or her hand or foot gets cut off and the buyer takes the compensation for that, then the one from whose hands she was captured should not take her except [by paying] the whole amount for which he bought her. And none of [the payment] for the injury or the decrease [in her qualities] is counted for him, and the payment for the injury is for the one who bought her" (according to the opinion of Abū Ḥanīfa and Abū Yūsuf.)

Al-Lu'lu'ī said: "If she becomes injured while in the hand of the buyer [with] an injury that decreases [her value] in half and the buyer takes the compensation, the one from whose hands she was captured may take her [by paying] half of the [original] price. And if the injury decreases her [value] by one-third, he may take her [by paying] two-thirds of the [original] price. The same

holds if the buyer injures her, then the one from whom she was captured comes seeking her: part of the price should be cancelled accordingly and then he may take her. And if her eye becomes lost because of a disease or she becomes sick, he may not take her except [by paying] the entire price or he may leave [her].”

All of them said: “If a she-camel or a [male] camel runs away to the Territory of War, or a mount goes to the Territory of War and falls into the hands of the enemy, or the enemy achieves victory over Muslims and takes from them mounts and camels, all of that is the same, and all becomes owned by the enemy, and if Muslims acquire it later and its owner finds it among the booty before it is given as spoil, he has the right to [take] it without [paying] anything. And if it is [recognized by its owner] after it has been given as spoil, he has the right to [take] it by [paying] its price. The same [holds] for cows, sheep, clothes, and all goods, except what can be weighed.”

They [also] said: “The one from whose hands goods, a concubine, or a male slave has been taken and who comes seeking to take [it] back should not be believed, and even if he swears, his oath should not be accepted [in this case] unless he provides two trustworthy witnesses [testifying] that it was his property and that they do not know that he sold it or gave it away as a gift. And if they disagree on the price, the final say should be for the one who bought it in addition to his oath unless the one from whose hand it was taken provides evidence that he bought it with less than that. And if both provide evidence, the buyer’s evidence should be taken into consideration [over the original owner’s].”

They [also] said: “If the polytheists capture something from the kinds of merchandise of a Muslim that are weighed or measured, wheat, barley, dates,

raisins, honey, oil, or the like, then Muslims capture it later and its owner comes to take it, then if he finds it in the booty before it is divided up, he has the right to [take] it without [paying] anything. And if . . .¹⁸⁴ because he should be judged to take it and it is in the hands of the one of whose share it became a part with the same measure or same weight, and therefore, if he is given the same as what he should get, we would void this [transaction]. And if the one of whose share it became a part sells it, the one whose [merchandise] was taken from his ownership may take it from him by [paying] its price if it has still not been consumed. But if the buyer has already consumed it, its [original] owner does not have any right over the buyer. The same holds for everything that the enemy captures from Muslim goods. If it is consumed while in the booty, whether consumed by the one of whose share it has become a part or consumed by the one who bought it or it could not be gained, its owner from whose hand it was taken does not have any right [of ownership] over the one who consumed it or the one who sold it in all of that." They said concerning *dirhams* and *dīnārs* the same as wheat and barley.

They [also] said: "If the polytheists capture a garment belonging to a [Muslim] man then Muslims capture it and it becomes part of the share of a man, and he cuts it and sews it as a shirt, then its owner from whose hand it was taken comes [to take it], he does not have any right [of ownership] over him. The same [holds] if they are knitting threads and he weaves them, or wheat and he grinds it. Also, if the polytheists are the ones who did [that], the owner of the threads does not have any right over him, whether it is in the booty before being divided or after it has been divided because since threads were taken from him, he should not take a garment. The same holds for all [other] things."

They said: "If it is a garment and the one who has it in his share paints it then its owner comes, he has the [right] to take it, and he should pay [the extra amount by which] the paint increased [its value]."

They said: "If a *mukātab* of a man, a [slave] mother of a child, or a *mudabbār* of a Muslim man is captured by the enemy people then Muslims acquire him, his owner has the right to [take] him without [paying] anything, whether he has been given as spoil or not. But if he is given as spoil and [later] taken from the hands of the one of whose share he became a part, the one from whom he is taken should receive a compensation that is equal to his price if he is a slave. The same holds if he is a slave that the polytheists captured and then manumitted or made as *mukātab* or *mudabbār*, then Muslims acquire him and he is given as spoil and becomes part of a man's share, and they do not know what the polytheists had done with him, such as manumission, *tadbīr*, or *kitāba*.¹⁸⁵ Then [if] they find out later, he is [considered] free and no claim of [enslavement] is over him. And the one from whose hands he was taken should be compensated for his price if he had been a slave. And if a slave from among the Muslims' slaves or a concubine escapes to the Territory of War and he falls into the hands of the polytheists who overcome him, then Muslims capture the slave or the concubine and the owner of the concubine or the slave comes seeking to take him while he is with the booty before being given as spoil or after, his owner from whom he had escaped has the right to [take] him because he escaped to them and they did not take him by force (according to Abu Hanifa's opinion). The same holds if the concubine has delivered children from a man from among the enemy people: the master has the right to [take] her with her children, whether she has

been given as spoil or not. The same holds if a man buys her from the booty or she becomes part of a man's share and he frees her, and then her owner, from whose hands she had escaped, comes [to claim her], he has the right to take her without [paying] anything. And the manumission made by the man who emancipated her is [considered] void because the escaped concubine was not captured [by force] by the polytheists. And if she delivers children from the one of whose share she became a part or from the one who bought her from the booty, then the one from whom she had escaped comes [to claim her], it should be judged that he receive her dowry and the price of her children from the one who had intercourse with her. And if she is from what the enemy had captured and [is then] recaptured [by Muslims], the manumission is [considered] valid, and her owner does not have any claim of [ownership] over her."

Zufar, Abū Yūsuf, and al-Lu'lu'ī said: "The escaped concubine and the captured one are the same. If the one from whose hand she has escaped or from whose hand she was captured finds her in the booty before she has been given as spoil, he has the right to [take] her without [paying] anything. And if she has become a part of a Muslim man's share, he [the owner] has the right to [take] her. And if the Imām has sold her, he [the original owner] has the right to [receive her] price that is equal to the one for which the merchant had bought her. And if she delivers [a child] from the one of whose share she has become a part or from the merchant who has bought her, the one from whose ownership she had escaped or from whose ownership she had been captured does not have any claim [of ownership] over her or her child. The same holds if the one of whose share she has become a part makes her a *mudabbara* or the one who has bought her [does

the same]: the *tadbīr* would be lawful, and the one from whose ownership she had escaped or from whose ownership she had been captured does not have any claim [of ownership] over her.”

Abū Thawr said: “If a slave escapes to enemy territory and then is captured by Muslims, he should be returned to his owner before being given as spoil or after. The same holds if the enemy captures him then Muslims recapture him.”

[Section 35.4]

They [Muslim jurists] disagreed on the rule concerning a man who buys a concubine or a slave from the collected booty and acquires with them a property after the army combatants have dispersed.

Mālik was asked about a man who buys a concubine from the Byzantines’ collected booty, and when he has left with her, he finds jewelry with her. He replied: “I do not see any harm [accruing] from what he gets, such as one set of earrings and the like. As for the large amount among that, which has a high [value], I do not think [it should be his].” It was said to him: “They might also buy, in Byzantine land, a ball of threads or the like with one *dirham* or so, and when the man leaves to his country and needs these threads and he opens it, he finds in it gold crosses that have [the weight] of seventy *mithqāl*.” He replied: “I hope that there is no harm in [having] it. What should he do? They dispersed and he went to his country, and those are here in Syria. He does not know what to do.” (Narrated to me from Yūnus from Ashhab from him.)

The *qiyās* of al-Awzā’ī and al-Thawrī’s opinion is that if he acquires with her a property before the army combatants have dispersed, he should return it to

the booty. And if the combatants have [already] dispersed, he should pay it as charity.

The *qiyās* of al-Shāfi‘ī’s opinion is that it should be returned to the booty if the booty has not [yet] been divided up. And if it has [already] been divided, he should submit it to the Imām.

Al-Sha‘bī said about [the case of] a man who buys a concubine from the booty [74] and with her [he finds] gold or silver: “It should be put in the treasury office.” (Narrated to us by Abū Kurayb saying, “Narrated to us by Wakī’ from Zakariyya from him.”)

[Section 35.5]

They [Muslim jurists] disagreed on the rule concerning the polytheists’ children if they are captured and with them are their fathers and mothers or only one of them or no one among them [the parents] is with them.

Mālik was asked about [the case of a Muslim] who buys a young Christian boy who might embrace Islam if he reaches puberty [while living] with him. He replied: “How can a young [person] be taken away from his parents?” It was said to him: “They died.” He replied: “I do not see any harm if he buys him, in my opinion.” Then he was asked about Zoroastrian captives: “May they be sold to those who embrace [a religion] other than the religion of Islam?” He did not see any harm in [doing] that. (Narrated to me by Yūnus from Ashhab from him.)

Al-Awzā‘ī was asked about [the case of] a boy and his father, a disbeliever, who becomes part of a man’s share, and [then] his father dies while [still] a disbeliever, and then the boy dies afterward: “Should he be prayed over [with the funeral prayer]?”¹⁸⁶ He replied: “Whoever bought a boy is fit for the

service, even if his father is not with him. And if his father leaves [the Territory of War] and [enters] with a pledge of security with the intent to buy him, he [the Muslim] does not have the right to sell him because he has left his religious community and entered into Islam when he bought him.” (Narrated to me by al-‘Abbās from his father from him.)

It was narrated to me from Mu‘āwiya from Abū Ishāq that he said: “I asked al-Awzā‘ī saying: ‘Children among the captives are acquired with their fathers and mothers. [What would be the rule concerning their case?]' He replied: ‘If he dies young while in the general spoil or in the one-fifth share or in the extra share of people and they are in enemy territory, there should be no prayer over him unless he has been given as spoil. But if he is taken from the booty and given as spoil and owned by Muslims, or some people among them buy him and share him and then he dies, he should be prayed over even if he is in enemy territory. And [the same holds] even if his parents are with him because the Muslims have more right over him than his parents. And if one of them emancipates his share [of the slave], his partners are obligated to free him.’” He [Abū Ishāq] said: “I asked Sufyān [al-Thawrī] about captives who are acquired while still young and some of them die. He replied: ‘It has been said, “If they enter into the Muslim community, they should be prayed over.”’”

Al-Shāfi‘ī said: “If with young boys are their fathers and mothers, the rule concerning them is the same as the rule concerning their fathers in terms of selling and buying from enemy people, polytheists, and others. And if he dies, there should be no prayer over him. And if they fall [under our control] and no one among them has one of his parents with him, they should not be sold to

polytheists, nor should they be paid as ransom because the rule concerning them is the same as the rule concerning their fathers, but if they [are] moved to be with us and [there is] no parent with any of them, the rule concerning him is the same as the rule concerning his owner.” (Narrated to us by al-Rabī‘ from him.)

Abū Ḥanīfa said: “If Muslims capture women of the enemy people and their children, and they are in the hands of the Imām with the booty and one of them dies, whether young or old, he should not be prayed over. And if they are taken out to the Territory of Islam and one of their men or women dies before he embraces Islam, he should not be prayed over. And if one of their boys dies before reaching puberty and with him is his father or his mother, he should not be prayed over if he did not embrace Islam, whether he had been given as spoil or not. And if a child among them, a girl or a boy, who has not reached puberty dies in the Territory of Islam without embracing Islam and his parents or one of them was not captured with him, he should be prayed over, whether he died while still in the booty or after he became part of one of the Muslims’ shares.”

He [also] said: “If his parents or one of them is captured with him and they are taken out to the Territory of Islam, and then his father dies in the Territory of Islam or the parent with whom he was taken to the Territory of Islam dies, then the child dies before embracing Islam, he should not be prayed over. And if the child is captured first and taken to the Territory of Islam, then his parents or one of them is captured afterward, he should be [considered] a Muslim because since he was in the Territory of Islam before one of his parents was captured, he is [considered] a Muslim; and if he dies, he should be prayed over. And if his parents or one of them is captured and taken out to the Territory of Islam, then the

child is captured afterward, whether he is captured by those who have captured his parents or captured by others in another place, he is [considered to be following] his father's religion, and he should not be [considered] a Muslim. And if he dies, he should not be prayed over. And if the child is captured and with him is his grandfather or his grandmother, and no one among his parents is captured, [75] he should be [considered] a Muslim if he is taken out to the Territory of Islam, and he is not [considered to be following] his parents' religion. And if he dies before embracing Islam, he should be prayed over." (This is [also] the opinion of Zufar, Abū Yūsuf, and al-Lu'lu'ī.) "And if she is a girl who has not yet menstruated, and she reaches [an age] at which someone like her would be having intercourse, then she is taken out to the Territory of Islam, she should be [considered] a Muslim. And if she becomes part of a Muslim man's share, he should wait for a month, then he may have intercourse with her." And if she declares disbelief and says: "I will not embrace Islam," Abu Yusuf said [concerning this case]: "She should be considered an apostate, and I dislike that he have intercourse with her." Zufar and al-Lu'lu'ī said: "It should not be [considered] disbelief until she reaches puberty. And he has the right to have intercourse with her, whether she is from the People of the Book or from others."

Al-Awzā'ī was asked about [the case of] a man who buys a child from the polytheists' children and then he dies. "Should he be prayed over?" He replied: "Khaṣīf narrated to me that he said: 'We bury him and we do not pray over him.'¹⁸⁷ Someone other than him used to say: 'He should be prayed over because he entered into Islam when he bought him.'" (Narrated to us from al-'Abbās from his father from him.)

Al-Sha'bī was asked [by someone]: "I come to Khurāsān and buy captives there, and [sometimes] one of them dies. Should there be a prayer over him?" He replied: "If he prayed, you should pray over him." (This was narrated to me from Mu'āwiya from Abū Ishāq from Sufyān from Salama b. Tammām saying, "I asked al-Sha'bī.")

Abū Ishāq said: "I asked Abū 'Awn about captives who die while still young while they are in the ownership of Muslims." He replied: "Until they pray."

[Section 35.6]

They [Muslim jurists] disagreed on what prohibits the shedding of an enemy's blood after their unanimous agreement that if he says: "I bear witness that there is no god but God and that Muhammad is His servant and messenger, and that everything that he came with is true, and I dissociate myself from all religions that disagree with Islam and the belief in the oneness of God," his blood is immune from being shed. The same holds if he is given a pledge of security before he is overcome [by capture] while resisting [Muslims]: his blood is immune from being shed.

It was said to al-Thawrī: "A man attacks a disbeliever and when he is over him [to slay him], he says: 'There is no god but God,' and he [the Muslim] stops attacking him but then he [the disbeliever] comes at him fighting." He replied: "He should fight him if [the disbeliever] fights him and stop attacking him if he says it." (Narrated to me by Mu'āwiya from Abū Ishāq from him.)

Al-Awzā'ī was asked about a man who attacks a disbeliever and then [the latter] says: "There is no god but God," and he [the Muslim] sees that he wants him to refrain from [attacking] him, and when he refrains from [attacking] him, he

goes toward his country. Should he follow him?" Al-Awzā'ī replied: "He should follow him and fight with him, and if the disbeliever stops fighting with him or says, 'I [profess] Islam,' he should bring him to the Imām." (Narrated to me from al-'Abbās from his father from him.)

It was narrated to me from Mu'āwiya from Abū Ishāq that he said: "I asked al-Awzā'ī about captives from the Byzantines and the Sicilians who are acquired, [both] young and adult." He replied: "Whoever you acquire from the young Byzantine captives, you should not sell him to the *dhimmīs*, and whoever you acquire from the Sicilians, Ethiopians, Turks, or others who does not profess a religion that he knows and he does not clearly explain it, but his religion is that whatever you invite him to [embrace], he responds [to it positively], he should be [considered] a Muslim. And if you own him, do not sell him to them. And whomever you acquire from the adults, you should invite him to embrace Islam and teach him. If he refuses, you may sell him to them if you want. And his [conversion] to Islam is for him to say, 'There is no god but God.'" He [Abū Ishāq] said: "I asked: 'What if he says it [only] with his tongue and his heart does not know it?' He replied: 'If he says it, he is a Muslim, then you teach him afterward.'"

Al-Shāfi'ī said: "If the one who wants to be accepted [as a Muslim] comes to the Imām and bears witness that there is no god but God and that Muhammad is His servant and messenger, and the Imām accepts him, his inheritance is for his Muslim heirs,¹⁸⁸ and the one who puts him to death should pay expiation and blood money." (Narrated to us from al-Rabī' from him.) And this, from his

saying, indicates that if an enemy person says that, his blood and his property are immune from [being shed and destroyed and acquired].

Abū Ḥanīfa and his companions said: "If he says: 'I bear witness that there is no god but God and I bear witness that Muhammad is His servant and messenger,' and he does not say, 'I am embracing Islam,' he is not [considered] a Muslim."

[Section 35.7]

They disagreed on the rule concerning a man from the army combatants who manumits one of the captives before the division [of the booty].

Al-Awzā'ī said: "If a man from the army combatants manumits a captive from the [capture] of the army combatants of whom he is [a part] and he has a share in it, his manumission is invalid." (Narrated to me from al-'Abbās from his father from him.)

Al-Thawrī said: [76] "If Muslims capture a polytheist man, and between him and a [Muslim] man from those who captured him is a blood relation, he should not manumit his share in him because it is not known who has the right [to own him] until he is given as spoil and becomes part of his share."

He [also] said: "And if a Muslim man witnesses [taking] the booty and he manumits a man who is [included] in the booty, he should not manumit him until he has been given as spoil and become part of his share." It was said to him: "What do you think if Muslims divide their booties and his blood relative becomes [shared] between him and few others?" He replied: "He may manumit him and pay his partners." He [also] said: "And if he is a *mu'āhad* and he raids

with them [the Muslims], it is the same [rule].” (Narrated to me by Mu‘āwiya from Abū Ishāq from him.)

He [Abū Ishāq] said: “Al-Awzā‘ī was asked about that and he replied: ‘He should not manumit his share in him if he is in the general [booty], and if he is [given] as an extra share of spoil between him and a large group of people, he should not manumit in such a case even if he is his father or his brother until he is in his ownership or divided between him and a few others. This is the same if he manumits a [slave] boy while he is with them: it should not be permitted until he is in his ownership or divided between him and a few people.’”

Al-Shāfi‘ī said: “If Muslims overcome the enemy and with them there is a Muslim’s child owned by the enemy, who is the son of a slave woman from among them, or among them is a Muslim’s father who is still among the enemy people, and his [Muslim] son participates in the war and he receives a share in his father or [in the opposite case] in his son, who are among them, any one of the two should not manumit the other until they are divided up. And if one of the two or both of them become [part of] his share, he should manumit, and if he does not [become part of his share], he should not manumit. And if someone says: ‘You say if he owns his father or his son, he should manumit him,’ and I say this if he brought his ownership by buying him or accepting him as a gift. But if he is donated to him or bequeathed to him, I would not [condone] his manumission of him until he accepts him [as a gift] and he can return the gift and what is bequeathed. If he acquires him [as booty], he should leave his share from the booty.” (Narrated to us from al-Rabī‘ from him.)

He [also] said: "He should not manumit him until he is in his ownership through division [of the booty] or through purchase, because this [case] is not similar to the [case] of a concubine with whom he had intercourse while he had a share in her. This is because we prevent applying the *ḥadd* based on doubt, but we do not validate ownership based on doubt." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If one of the Muslim armies acquires polytheist captives and the capture is not divided up and is not sold until a Muslim man from the army manumits a person from the spoil, the manumission is invalid. The same holds if a man from the army manumits all of them: his manumission is invalid because it is not [yet] known where his share [belongs]. And if he sells, his sale should not be permitted. The same holds if all of the army's combatants who have overcome them manumit them: their manumission should not be permitted until they are divided up. The same holds if the Imām takes away their one-fifth share then he wants to divide their four-fifths among the army combatants, and a man from the army or all of the army combatants manumits all or some of them: it should not be permitted. And if the Imām divides them up and each number of them [the Muslims] receives one man or two men from the spoil or more than that, and if the number of those to whom [spoil] is distributed is a hundred or less, and one of them manumits one or all of them, it is permitted, and he should pay his partners the value of their share if he is wealthy, but if he is in need, they [the freed slaves] should hasten to pay the share of his partners. And this [case] and the previous one are the same in terms of *qiyās*, but we prefer to permit the manumission if it happens among one hundred

[Muslims] or less, and if it is among more than a hundred and there is no doubt [in affirming] that, then one of them manumits [a slave], we would not permit it.”

[Section 35.8]

They disagreed on the rule concerning a man from the army who puts a captive to death.

Al-Awzā'ī was asked about a man who captures a disbeliever and puts him to death or puts a captive to death after he reaches with him to the Imām. He replied: “If he puts him to death after he captures him, he should be punished. And if he puts him to death after reaching with him to the Imām, he should be fined his price.” (Narrated to me from al-‘Abbās from his father from him.)

Al-Shāfi'ī said: “If a man puts a captive to death before or after reaching the Imām, whether in the Territory of War or after leaving it, without the Imām's command, he is committing a bad deed, and he should not be fined. This is because since the Imām may free him, put him to death, or ransom [a Muslim captive] with him, the rule [concerning him] is different from the rule of properties that the Imām should not [take] but give to those who acquired them. [77] But if he puts a child or a woman to death, he should be punished and fined their prices. And if he consumes a property, he should be fined its value. (Narrated to us from al-Rabī' from him.)

[Section 36]

They [Muslim jurists] agreed unanimously that the separation between a child, whose suckling front teeth have not yet fallen out and who has not yet reached seven years old, and his mother is not permitted.

[Section 36.1]

They, however, disagreed on the permissibility of the separation between him and someone other than his mother, on the time in which the separation is permitted, and on the rule concerning the sale if a separation between them [is done].

Mālik was asked about the Prophetic tradition which says: "A mother should not be deprived of her child."¹⁸⁹ He replied: "As for us, we hold that there should be no separation between a mother and her child until he reaches puberty." (Narrated to me by Yūnus from Ibn Wahb from him.)

He [Ibn Wahb] said: "I asked Mālik: 'What is the exact [age] limit for that?' He replied: 'If he has lost his suckling teeth.' I asked him: 'What do you think about the father and his child?' He replied: 'Nothing like this is included [within the rule].'"

Al-Shāfi'ī said: "If a man owns people from the same household, he should not separate a mother and her child nor a child and his father until the boy reaches seven or eight years old. If he reaches that age, it is permitted to separate them. The same holds [concerning] a grandchild whoever they are. As for brothers, separation may be [done] between them." (Narrated to me by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "It is incumbent on the army's commander that if they acquire booty from the enemy and with them are slaves, and he wants to divide them up or sell them and among them are a man and his wife and with them are their young children, whether they embrace Islam or not, he should put the man, his wife, and his children in the share of a Muslim man. And if the number of slaves does not make this man, his wife, and his children [part of one] share, he should give them to a small group of Muslims. If this cannot happen, he should sell them together and he should not separate them. And if he separates them in the division or the sale, it is [still] legally valid, and he is [considered to have] committed a bad deed" according to the opinion of Abū Ḥanīfa and Zufar. As for Abū Yūsuf and al-Lu'lu'ī, they said: "It is incumbent on him if he separates them that he get them back until he can join them together to sell them or assign them to the share of [one] man. The same holds if there are among the captives a woman and her young son and his father was not captured with them, or there are a man with his young son and the boy's mother is not with them, or there are two young brothers or one of them is young and the other an adult and neither of their parents is with them. The same holds for the sisters if both are young or if one of them is young and the other an adult. The same holds for a man and his nephew who is young, and the boy or the girl if there is with one of them his paternal or maternal uncle or his grandfather or grandmother or nephew or an immediate blood relative from the men or women: [in all cases] the [army] commander should not separate any of them in terms of division or sale. And if there are with the boy his parents and with him [also] his paternal and maternal uncles, there is no harm in separating the paternal and maternal uncles

and the parents with the boy. He should not separate the parents and the boy in the division and the sale. And if he separates any of those whom we have named, he is committing a bad deed, but it is [still] legally valid," according to the opinion of Abū Ḥanīfa and Zufar. "And he should not separate [them], but if he separates [them], he should take them back until he can join them together then assign all of them in the share of [one] Muslim man or sell them together," according to the opinion of Abū Yūsuf and al-Lu'lu'ī.

All of them said: "There is no harm if he separates a woman and her husband, if they are both in the capture, in terms of division and sale, and he may assign the husband to the share of a man and the wife to the share of another while they are still married."

They [also] said: "Concerning all of those that we mentioned who should not be separated from their companion, it is not permitted to separate them as long as they are young. But if they are adults who have reached maturation and there is no young [person] among them, there is no harm in separating them in terms of division or sale. And if there is a boy in the capture and with him are two, three, or more of his brothers, and the same holds if there are with him his brothers or sisters, [78] paternal or maternal aunts, whether they be young or adult, he should not separate between any one of them and the boy in terms of division or sale."

As for Bishr, he narrated from Abū Yūsuf that he said: "I do not invalidate the sale in any [case] of separation except in [the case of] a child and his mother. As for between blood relatives, I dislike that, but I do not invalidate [that type of] sale."

The reason (*'illa*) for Mālik's opinion that separation is permitted except between a child and his mother is that for a child and his mother, there is a consensus on prohibiting the separation between them, and therefore one should abide by this [judgment]. And [as for] other than the [case of the] two [mother and child], it is disagreed upon. And a man has [the right] to change anything in his ownership as he wants unless he is prohibited with what he should abide by."

The reason for al-Shāfi'ī's [opinion] is similar to this, but for him the father is the same as the mother, in the sense that the child cannot be independent from any one of them because the father is obligated to provide for the child. But the brother, for him, is not like that. As for the limit he sets as seven or eight years of age, it is [based on] the choice that God's Messenger gave to a boy between parents, and this would be a separation between them.¹⁹⁰ The same holds in the case of capture.

The reason for the one who holds Abū Ḥanīfa's opinion is that everyone who is an immediate blood relative is similar to the mother [based on] *qiyās*. This is because she is an immediate blood relative and therefore separation is not permitted except during the time [of the child's age] in which there is no disagreement due to their consensus to prohibit [such separation] in any situation related to a boy. All of the situations that relate to a boy are the same.¹⁹¹

[Section 37]

All of the scholars of *siyar* agreed unanimously, based on tradition, that the Messenger of God gave the captives of Qurayza, when they asked him to rule among them according to Sa'd b. Mu'adh's judgment, what they asked for, and that the Banu Qurayza accepted Sa'd's judgment [which was that] he ruled that their combatants be put to death and their children enslaved, and that the Messenger of God executed Sa'd's rule and put their combatants to death and enslaved their children.

[Section 37.1]

Then scholars disagreed on the like of such judgment and who should be permitted to follow his judgment.

Al-Shāfi'ī said: "There is no harm if the Imām accepts from the people of a fortress or some of them that they follow the Imām's judgment or that of other than the Imām if the one whose judgment is followed is trusted and in the position to do so in terms of his rational ability and his view of Islam. This is because the *sunna* and traditions indicate that the Imām's acceptance is for those whom I have described from well-trusted and knowledgeable people. Thus, it is not permitted for the Imām, in my opinion, to accept other than those of the people of trust and reason, [otherwise] he would then be accepting other than what they [the enemy people] have accepted from him. And if he does [that], he has abandoned the right view [of Islam] without having any excuse [to do so]." (Narrated to us by al-Rabī' from him.)

Abū Yūsuf said: "If the people of a fortress accept that so-and-so judge on [their case] and that if they do not accept him as arbiter, they will be returned to their fortress, and they accept this [agreement] and then this [Muslim] person judges that the combatants should be put to death, it [the judgment] should be executed based on their initial acceptance and they should not have [the right] to rescind this [agreement] after the judgment is decided. But if they retract from that [agreement] before this person judges [on their case], they have [the right] to do so. And if they accept but then dislike that so-and-so judge [on their case] before he rules, they should be returned to their fortress. Do you not see that if this person were to die before he rules, they would be returned to their fortress? And if this person declines to rule, they should be returned to their fortress. And if they and the Muslims agree that another Muslim judge [on their case] and he rules [in favor of] putting [combatants] to death and enslavement, it is permitted. And if he rules that they be *dhimmīs* and pay the *kharāj*, it is permitted. And if he rules that they be enslaved and [considered] booty, it is permitted, and they are obliged to do so. And if he rules that they be returned to their fortress and the matter judged later, it is permitted for Muslims [to do so], similarly to saying, 'I will not rule,' or similarly to [the case of] his death. And if he rules [on their case] that they live in the Muslims' territory without paying a poll tax on themselves, this is not permitted. Such a judgment from him is against the [79] *sunna*. And if they accept to be *dhimmīs* and pay the poll tax, they have [the right] to do so. But if they dislike paying the poll tax, they should be returned to their fortress and fought. And if some of them come out so that soand-so would rule [on their case] and when they reach the Muslim army, the fortress is conquered and those inside

it are put to death, then those in our hand should be [treated] according to what they have agreed on. If they make a condition that if they do not accept [the agreement] they would be returned to their fortress, and they do not accept the judgment over them and the fortress has [already] been conquered and demolished, they should be returned to the nearest place in which they feel safe. And if the people of the fortress have concurred on [accepting] the decision of those [who came out] regarding the peace agreement, the Muslims should not fight with them until they know what those [who came out] did. But if they [the Muslims] do [fight] and put them to death, there should be no blood money or a guarantee of payment for them [to pay], but they would be doing a bad deed and an injustice and doing what is not permitted for them to do. And if soldiers from the polytheist people or from the people of the fortress ask Muslims for a pledge of security while they are in the midst of fighting and they grant them a pledge of security, then they fall into the hands of Muslims and they want to leave to their secure place in the Territory of War, they do not have [the right] to do that. And the Muslims may imprison them and make them *dhimmīs* paying the poll tax. This is not similar to [the case of] a man who asks for a pledge of security without fighting [with Muslims]. It is for him to return [back to his territory] if it is not a conditioned pledge of security. But as for those who ask for a pledge of security in the midst of fighting, [their case is] according to what I described to you. Do you not think that if the Imām shouts: ‘Whoever comes to us is secure,’ and one, two, or ten people descend from the fortress, they would be secure and [considered] *dhimmīs*? The same holds for the people of an army who fight Muslims: they would be as I described to you.”

He [Abū Yūsuf] said: "If they accept the judgment of two men and one of them dies or they disagree on their judgment over them, neither of the two sides is obligated by the judgment made by either of the two, and what obligates them is only their agreement on one judgment. And if they make a peace agreement that they be judged by God's ruling or the Qur'ān's ruling, this would be the meaning of the Prophetic tradition which came with forbidding [such agreement]. But if they do [agree on this ruling] and they respond positively, the judgment concerning them should be for the Imām to choose what is best for the religion and Islam from among the rulings of putting to death, freedom, or enslavement. And if they ask that he [the Imām] decide [their case] based on the judgment of a *dhimmī* man, their request should not be answered and they should not be given [such a choice], and it should not be permitted that people of disbelief judge on the rights of Islam and religion."

He [Abū Yūsuf] said: "If they accept the judgment of a man whom they do not name, it should be for the [Muslim] ruler to judge over them in accordance with what is best for Islam and religion. And if the one who judges over them is blind or someone who has been punished with a stipulated punishment in the Qur'an (*maḥdūd*) for committing a false accusation of fornication, he should be [considered] as I have described about the judgment of a woman. The provincial governor should not accept, in such cases, the judgment of a boy, a woman, a slave, a *dhimmī*, a blind person, someone punished for an accusation of fornication, an unrighteous man, or someone with a low and bad behavior. Rather, he should choose [someone] for this [judgment] based on [the quality of] wisdom, religion, the degree to which he commits to Islam in terms of his opinions, mental

ability, insight, and his protection of religion. The judgment on such [a case] should not be mismanaged so that it is assigned to someone, whom we have described, of those whose testimony is not permitted nor his judgment between two people if they have quarreled. And if they accept the judgment of a man that they choose from among the army's people, I would accept that from them. And if they choose a man who is qualified to do so, I would accept that from them. But if they choose someone whom we have described of those whose judgment is not permitted, I would not accept that, and I would turn them back until they choose a qualified man to judge or we return them to the fortress in which they had been; and we would not return them to a fortress that was more fortified [than the first] nor to soldiers among them by whom they would be protected. Rather, we would return them to the place from which they came to us. And if they ask to follow the judgment of a Muslim man and a man among them, the provincial governor should not accept that from them, and he should not let a disbeliever rule on [a matter of] religion. And if he does and they rule, their judgment concerning anything should not be executed unless they embrace Islam or become *dhimmīs* because this would be accepted from them without any judgment. And if they ask to follow the judgment of a Muslim captive who is in their hands, the provincial governor should not accept their request. And if he does, the [captive's] judgment should not be permitted because if he grants them security, I would not validate his pledge nor would I execute it. The same holds [in the case of] a Muslim merchant [80] who is with them in their territory. The same holds [in the case of] a man from among them who embraces Islam while he is [still] with them in their territory. The same holds if he is with the Muslim army but he was [originally]

from them, even if he is a Muslim. The provincial governor should not accept him as an arbiter because of the seriousness of this ruling and what is feared from carrying its [burden] on Islam and religion and the [possible] accusation and doubt.”

[Section 37.2]

They disagreed on the [case of] a Muslim man who is discovered to be leading the enemy into [knowledge of] the Muslims' vulnerable [places].

Mālik was asked about a Muslim spy who is found writing to the Byzantines and informing them about Muslims' [activities]. “What do you think about his [case]?” He replied: “I have not heard of anything concerning his [case], and I think his [case] should be for the Imām's discretion.”¹⁹² (Narrated to me from Yūnus from Ibn Wahb from him.)

Al-Awzā'ī was asked about a Muslim spy: “What should be his punishment?” He replied: “He should be asked to make repentance, and if he does repent, his repentance should be accepted. And if he refuses, the Imām should punish him with a painful punishment, then he should displace him to a faraway place and he should also be guaranteed imprisonment.” (Narrated to me by al-'Abbās from his father from him.)

It was said to al-Shāfi'ī: “What do you think about a Muslim who writes to the polytheists from the enemy people that Muslims want to raid them or [writes about] one of their vulnerable [places]? Should that permit [violating] his sanctity? And does this indicate [his] allegiance to the polytheists over the

Muslims?" He replied: "[Shedding] the blood of the one for whom the sanctity of Islam is evident is not permitted unless he commits murder or adultery or clearly disbelieves after [embracing] belief [in Islam] then insists on [following] the disbelief. It is not for leading [the enemy] to a Muslim's exposed vulnerability or supporting a disbeliever by warning [him] that Muslims want to surprise him with an attack that he can avoid or [if he] advances with hurting Muslims through clear disbelief." It was said to him: "Should the Imām, if he finds such a [case], order a punishment of the one who did it or leave him alone as the Prophet left alone [the one who did that]?" He replied: "[Certain] criminal punishments are different from the *ḥudūd*. As for the *ḥudūd*, they should not be cancelled in any way, but as for criminal punishments, the Imām may abstain from [applying] them based on [his] discretion. It was narrated from the Prophet that he said: 'Avoid [applying punishments] on those characterized by good [religious] character,' and he said in the Tradition: 'Unless it is a *ḥadd*.'¹⁹³ Thus, if a man with good [religious] character commits [such a crime] based on ignorance as was done by Ḥaṭīb¹⁹⁴ ignorantly, and he [the spy] is not accused of being [immoral or non-religious], I prefer that he [the Imām] avoid [the punishment]. And if it is [done by] other than a person with good [religious] character, the Imām should apply on him a discretionary punishment (*ta'zīr*)." (Narrated to me by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If a Muslims' provincial governor catches a spy for the polytheists in the Territory of Islam and he is a Muslim, he should inflict on him a painful punishment and elongate his imprisonment until he shows repentance."

[Section 37.3]

They disagreed on what the punishment should be for the one who steals from the booty.

Mālik was asked about [the case of] a man who steals from the booties: "What should be his punishment?" He replied: "As a well-known and decided [punishment] that should be applied to him, we do not know. As for the opinion of the one who says: 'His goods should be burned,' I do not [approve]." Then he said: "And if the political authority punishes him, he deserves it." (Narrated to me by Yūnus from Ibn Wahb from him). He [Ibn Wahb] said: "He [Mālik] was asked about [the case of] a man who unlawfully takes from the booty in enemy territory and then repents from doing that after he returns." He replied: "If the people have already dispersed in many countries, I hold that he should pay as charity what he unlawfully took and repent to God."

Al-Awzā'ī was asked about the unlawful gain of booty (*ghulūl*), and it was said to him: "Is the punishment the same whether it is a small or large amount?" He replied: "The same." (Narrated to me by Mu'āwiya from Abū Ishāq from him.) He [Abū Ishāq] said: "I asked him: 'Should what was unlawfully taken be burned?' He replied: 'No.' I asked: 'Should his goods be burned?' He replied: 'Yes.' I asked: 'Should he be deprived of his share?' He replied: 'Yes.' I asked: '[How about] the share of his horse?' He replied: 'Yes, he should not be given anything for his raid, and his punishment should be for the Imām's discretion.' I asked: 'What do you think if he has already consumed what he unlawfully gained?' He replied: 'The Imām should hold him liable [for what he took] and burn his goods.' I asked: 'What of his goods should be burned?' He replied: 'All

of his goods with which he raided, his saddle, and his saddle's pad.' I asked: '[How about] his mount and his money if they were in his bag?' He replied: 'No.' I asked: 'Should his weapon be burned?' He replied: 'No, nor his clothes that were on him.' I asked: 'What do you think if one of his goods that was burned remains and the fire does not burn it, such as [something made of] iron or something else: may anyone [else] take it?' He replied: 'No, the punishment has already been applied. [81] Therefore, whatever survives the fire, its owner has the right to take it.' I asked: 'If a man unlawfully takes something from the booty and it is not known until he returns to his family, and then the unlawful booty is found in his house, should his goods that are in his house be burned or [only] the goods with which he raided?' He replied 'His goods with which he raided.' I asked: 'What if an unlawfully taken thing is found in the goods of a man who died? Should his goods be burned?' He replied: 'No, because the Messenger of God did not burn the goods of the man in whose goods they found unlawful booty and he had died.' I asked: 'Should he be deprived of his share?' He replied: 'Yes, if they have not yet divided [the booty]. And if he has already taken his share, it should not be taken from him.' I asked: 'If he has already consumed the unlawful booty, should he be liable and should its value be taken from his inheritance?' He replied: 'Yes.' I asked: 'Should the one who unlawfully takes from the booty be prayed over if he dies and the unlawful booty is found in his goods?' He replied: 'As for the Messenger of God, he abandoned the prayer for him and said: "It is your matter [to deal] with your companion."' I asked: 'Should the people in general pray over him?' He replied: 'Yes.' I asked: 'If a boy who has not yet reached puberty unlawfully takes a thing, should his goods be burned and should

he deprived of his share?' He replied: 'His goods should not be burned, but he should be deprived of his share.' I asked: 'Should he be liable if he has already consumed it?' He replied: 'Yes, if he has anything [to pay].' I asked: 'If a woman unlawfully takes a thing, should her goods be burned?' He replied: 'Yes.' I asked: '[How about] the punishment?' He replied: 'That would be enough for her.' I asked: '[How about] the slave who takes an unlawful thing?' He replied: 'The Imām's discretion should [decide] his punishment, and his goods should not be burned because they belong to his master.' I asked: 'Should his master be liable if the slave has already consumed the unlawful booty?' He replied: 'It should be the responsibility of the slave. If his master wants, he may pay for him, or if he wants, he may let him be [responsible] for his crime.' I asked: 'If a *mu'āhad* commits *ghulūl*, should his goods be burned?' He replied: 'I do not see any harm in [doing] that if it was used to help against the enemy.' I asked: 'How about if a servant steals from the booty?' He replied: '[His hands] should be cut off based on evidence because he does not have any share in it.' I asked: '[What] if an unlawful booty is found with a man and he says, "I bought it or I took it mistakenly"?' He replied: 'His punishment should be mitigated.' I asked: 'And will his goods not be burned if it entered his share?' He replied: 'No.' I asked: 'A man buys something from the one who is responsible for dividing up the booty, but he does not pay to him its price until the army has dispersed, then he asks a judge to get it from him. Should he pay it to him?' He replied: 'If he does, he should make him responsible for dividing it. And if he does not ask him to pay, he should pay it as charity on behalf of the army.' I asked: 'What if he knows that the one who divides [the booty] cannot, if he takes it from him, pay it to those who

deserve it? Should he pay it to him or to that army's commander?' He replied: 'If he doubts his honesty, he should pay it as charity on their behalf.' It was said to him: 'Is it the same if the unlawful booty is found with a man and it was already put with the collected booty and he took from it, or if he unlawfully takes from it before he has brought it to the place where the booty is collected?' He replied: 'It is the same. It is *ghulūl*. And if he steals it from the booty, it is [even] more mischievous because it is a *ghulūl* of what has not yet been divided up.'"

He [Abū Ishāq] said: "I asked Sufyān [al-Thawrī] and al-Awzā'ī about [the case of] a man who unlawfully takes from the booty then regrets [doing that], but the army had already dispersed. They said: 'He should pay it as charity on behalf of that army. And if he has consumed what he unlawfully took, he should be liable to pay [its value].' Sufyān said: 'If he cannot [pay it] to them [army combatants] or their heirs.'"

Al-Shāfi'ī was asked: "What do you think if a free or a slave Muslim raider or a *dhimmī* or a *musta'man* takes from the booties something before it is divided up?" He replied: "[His hand] should not be cut off, and each one of those should be liable for paying the value of what he stole if it was consumed before paying it. And if such people are ignorant, they should be taught and not punished. But if they do it again, they should be punished." It was said to him: "Should he be dismounted from his mount, or should his saddle or his goods be burned?" He replied: "A man should not be punished with his property, but he should be physically punished. God made the *hudūd* applied to the bodies. The same should be for criminal punishments. But as for properties, there is no

punishment for them. And [both] the small and large amount of *ghulūl* is forbidden.” (Narrated to us from al-Rabī‘ from him.)

According to al-Shāfi‘ī’s opinion, “If the one who unlawfully takes a thing from the booty regrets [doing so] after the army has dispersed, he should give it to the Imām.” (Narrated to us by al-Rabī‘ from him.)

Abū Yūsuf said about [the case of] a man who takes something from the booty intending to steal it but consumes it in [82] the Territory of War or loses it: “It is the same and he is a sinner doing a bad deed, but there is no liability against him because the booty had not yet been collected and divided up.¹⁹⁵ And if a group of soldiers joins them [the Muslim combatants], they should share with them the booty. And if he does not consume it in the Territory of War nor lose it until he leaves for the Territory of Islam, then he loses it or consumes it, he should be liable to [pay its value] when the booty is divided up until he returns it to the booty. But if the booty has already been divided up, he should pay its value as charity. And if the ruler knows of all of such [cases], he should apply on [such people] a discretionary punishment (*ta‘zīr*). And if he takes something from the booty aiming at putting it with the spoil and giving it to the ruler, but then he prefers to keep it and steal it, then he consumes it in the Territory of War or loses it or gives it to a man as a trust but the latter loses it, there is no liability against him. And if he takes it with him to the Territory of Islam, there is no liability against him. This is because his original taking of it was lawful. He took it so that he could [later] put it in the booty, and his intention to steal it was not the original one so he is accordingly not obligated to liability. Do you not see that if a man has a trust [of another] and he decides to violate the trust, he should not be liable until

he consumes it. And if this person leaves with this unlawful booty to the Territory of Islam and consumes it, he should be liable. And if a man acquires booty in the Territory of War and the Imām orders people to return the booties, but he does not do that and decides to steal it, he is similar to the previous [person] because he did not do any initial violation. And if the Imām says to him: 'Give what you have from the booty,' and he replies: 'I do not have anything,' this is similar to the one who took it intending to steal it. The answer [concerning this case] is similar to the answer in that case. Therefore he [the Imām] should not burn the goods of the one who commits *ghulūl*, but he should be subjected to discretionary punishment.

[Section 38]

They [Muslim jurists] agreed unanimously that whatever is lawful to sell is also lawful to be divided in the booties.

[Section 38.1]

They disagreed on the permissibility of dividing things on which there is disagreement on the permissibility of their sale and on what is forbidden to be sold in any way.

Al-Awzā'ī was asked, and it was said to him: "[What if] we acquire one of the Byzantine religious books (*muṣḥaf*) in their territory:¹⁹⁶ should this be sold or burned?" He replied: "I prefer that it be buried." I [Abū Ishāq] asked: "You do not think that it should be sold?" He replied: "How can that be and it has their polytheism [in it]?"

He [Abū Ishāq] said: "And I asked al-Thawri, al-Awza'i, and others about one of the Muslims' Qur'āns (*muṣḥaf*) that we acquire in the Territory of War. They replied: 'If its owner is not found, it should be put with the collected booty and sold.' I asked al-Awzā'ī: '[What if] they acquire silk, a bracelet that has crosses, [little] statues, *dirhams* and *dīnārs* that have crosses and [the symbols of] polytheism [on them], and a cross made of silver or gold?' He replied: 'They used to acquire this and bring it to the collected booty to be sold. As for the cross, I prefer that it be broken and then sold. The *dīnārs* used to be before as such and they used them in sale among them.' I asked: '[What if] they acquire a dog?' He replied: 'Nothing good [comes] from a dog even if it is a hunting dog. It should not be divided and it should not be kept.' I asked: '[What if] they acquire a lynx?'

He replied: 'It is similar to the dog.' I asked: 'What if they acquire a cat?' He replied: 'It should not be sold because [taking] its price is disliked, and I do not think that anyone should take it for himself.' He [al-Awzā'ī] said: 'If they acquire a hawk or an eagle from what they got in their houses, it should be sold in the spoil. But if it is not from what they got in their houses, it should be for the one who took it.' It was said to him: 'What if a man acquires a hawk and he sends it for hunting, and then he takes the hunted animal and the hawk flies away?' He replied: 'If the Imām wants, he may make him liable, or if he wants, he may leave him, and he did wrong when he sent it [for hunting]. But as for what is acquired, it may be eaten.'” (Narrated to me by Mu‘āwiya from Abū Ishāq from him.)

Al-Shāfi‘ī said: “Whatever from their books is found, all of them should be [considered] booty. The Imām should call upon someone to translate it. And if it [contains] knowledge, such as medicine, etc., in which there is no harm, he should sell it [83] as he would sell other booties. And if it is a book of polytheism, he should tear apart the book but benefit from its binders and equipment, and he should sell them. There is no point in burning it or burying it before it is known what it is.” He [al-Shāfi‘ī] said: “And if Muslims conquer the Territory of War so that it becomes a Territory of Islam or a *dhimma* to which [Muslim] rule applies, and they acquire wine in jars or skin receptacles, they should pour away the wine and benefit from the skin receptacles and jars, and they should clean them and not break them because breaking them would be mischief. But if they do not conquer it and their acquisition is due to a raid and not an acquisition by which the rule would be applied, they should pour the wine out of the skin receptacles and jars, and if they are able to carry them or to carry what is light in weight, they should

carry them as booty. But whatever they cannot [carry], they may burn it and break it if they want when they march.”

He [also] said: “And whatever that has a value that is found from the enemy’s properties, such as a cat or a hawk, should be [considered] booty. And whatever dogs are acquired should be booty if anyone wants it for hunting and the like or agriculture. And if no one among the army combatants wants it for this purpose, he should not keep it because whoever takes it for another purpose is committing a sin.¹⁹⁷ And I think that the army commander should take it out [of the booty] and give it to the people of the one-fifth share from the poor and the needy and those mentioned with them, if any one of them wants it for agriculture or the like or hunting. But if he does not want it, he may put it to death or let it alone, and he should not sell it.” (Narrated to us from al-Rabī‘ from him.)

[Section 38.2]

They disagreed on the ruling concerning the properties of monks.

Mālik was asked about the properties of monks in enemy territory: “May they be taken?” He replied: “As for what satisfies his need, it should be left for him. But as for other than that, it should not [be left] when he alleges [more than his basic need].”

He also said: “Two cows are enough for him in my opinion. And if his claim is accepted, he will allege [the need] for many things.” (Narrated to me by Yūnus from Ibn Wahb from him.)

Yūnus narrated to me from Ashhab that Mālik was asked about [the case of] a monk that has sheep and a farm in Byzantine territory: “Should they take

it?" He replied: "No, this is little, the farm and sheep in Byzantine land." It was said to him: "And you do not hold that his cows and sheep should not be taken from him?" He replied: "Yes, his cows and sheep should not be taken away if it is known that they are his. There is a way to know that, and I do not know how it is known." It was said to him: "[Should] the monk be kept from being brought down from his monastery and should he not be disturbed?" He replied: "Yes, he should not be brought down from it nor disturbed."

It was said to al-Awzā'ī: "[How about] a disbeliever is found in Byzantine land in a house that is sealed on him and has an opening from which he can look [to the outside], and [he is] not in a monastery?" He replied: "This is a monk who has imprisoned himself." It was said: "Should he not be put to death or enslaved?" He replied: "He should not be put to death or enslaved." (Narrated to me by Mu'āwiya from Abū Ishāq from him.)

He [Abū Ishāq] said: "I asked: 'What if in his monastery or in that house of his is found goods or a property?' He replied: 'They used to not enter their houses and take the property.' I asked: 'What if they find cows, sheep, goods, or anything from him that is outside his house or monastery, or if they find that he has already died in his monastery?' He replied: 'All of that should be taken and put into the collected booty.' I asked: '[What] if they find a monk who comes down from his monastery and he is seized and taken, but he says, "I was afraid of you, so I escaped and went down to come to you"?' He replied: 'He should not be taken away.' I asked: 'May they get information from him about something related to the state of their enemy?' He replied: 'No, if they ask him for information and he informs them, and if the enemy asks him to provide

information about you, you would [then] permit [the shedding of] his blood.' I asked: 'What if they find food in his monastery and they need it?' He replied: 'They may take from it and leave what will sustain him.'"

Al-Shāfi'ī said: "Since there is no evidence in refraining from putting the monk to death except what we have described, we would take as booty every property belonging to the monk, whether in his monastery or other than his monastery, and we would not leave for him anything. This is because there is no tradition to be followed [indicating] that this should be left for him. And the children and women of monks should be enslaved if they are not nuns. The original [rule] concerning [the case] is that God permits [taking] the properties of polytheists. And if it is said: 'Why you do not prevent [taking] his property,' it would be replied: 'As I do not prevent [taking] the property of a woman and the newly-born, but I prevent [shedding] their blood.'"

He [al-Shāfi'ī] said: "I prefer to leave alone women who become nuns as I do with men. But if a polytheist male or female slave is a monk or a nun, I would enslave them because if the master embraces Islam, I would rule that he may enslave them and prevent both of them from being a monk or a nun. This is because slaves [84] do not possess of themselves as free [people] do." (Narrated to us by al-Rabī' from him.)

He [al-Shāfi'ī] said in the book of *Siyar al-Wāqidī*: "It is permitted to kill monks." And we already mentioned that above.

Abū Ḥanīfa said about this [case] what is similar to al-Shāfi'ī's opinion. He [also] said: "It is permitted to kill monks unless the territory is conquered and won over."

[Section 38.3]

They disagreed on the rule concerning what is acquired from treasures and items found (*luqṭa*) in enemy territory.

Mālik was asked about [the case of] a man who finds a buried treasure in the Territory of War. He replied: "He should put it in the Muslims' booties." (Narrated to me by Yūnus from Ibn Wahb from him.)

He [Ibn Wahb] said in another narration: "Mālik was asked about [the case of] a man who finds treasure (*rikāz*) buried in enemy territory and he takes it: 'Is it his?' Mālik replied: 'No, it should be for all Muslims because he could not reach that place alone.' Mālik [also] said: 'It should be for the Muslim community.'"

Al-Awzā'ī was asked about [the case of] a man who acquires in the wasteland between us and the enemy copper and precious stones. "What is your assessment about this and do you think that a one-fifth share should be taken from it?" He replied: "If the wasteland is in [a place] mostly [controlled by] Muslims, it is his after [taking] the one-fifth share. But if the enemy mostly controls the wasteland, it should be according to the Imām's opinion. He may give it as an extra share after [taking] the one-fifth share if he wants." (Narrated to me by al-'Abbās from his father from him.)

It was narrated to me from Mu'āwiya from Abū Ishāq that he said: "I asked al-Awzā'ī about the gold or silver that is acquired in enemy territory if the tombs are exhumed, and he [the person who acquires it] is with an army. He replied: 'It should be [considered] booty similar to [any] enemy properties, and the one-fifth share should be [taken] from it. And the one who acquires it and the

army should share it because he acquired it with the army's power. And if the Imām wants, he may give him an extra share from it, and a one-fifth share would be [taken] from his [extra share].’ I asked: ‘What do you think about what is found in the sea in enemy territory, such as gems or pearls?’ He replied: ‘It should be for the one who acquired it after [taking out] the one-fifth share, and it should not be for [other] army combatants. It is not similar to [acquiring] an unearthed treasure.’ I asked: ‘How about fully made jewelry that is found in it [the sea]?’ He replied: ‘It should be considered enemy property.’”¹⁹⁸

He [Abū Ishāq] said: “I asked him about the gold or silver that is found in the tombs when they are exhumed in [a place] mostly controlled by Muslims. He replied: ‘It should be for the one who finds it, and it should be [considered] buried treasure and a one-fifth share should be taken from it.’ I asked: ‘What do you think about *rikāz*? What is it?’ He replied: ‘Anything that is found inside the earth that is not for this [Muslim] community is *rikāz* with a one-fifth share [deducted] from it.’ He [al-Awzā‘ī] said: ‘The *sunna* used to be that the *rikāz* was in gold and silver, but then they also took from iron, copper, and lead.’ I asked: ‘Do you think that one may take from it?’ He replied: ‘I do not see any harm [in doing that].’ I asked: ‘[How about] baked pottery, Egyptian glass, and the like of such [items] found?’ He replied: ‘I do not consider this as *rikāz*.’ I asked: ‘[How about] what is found over the earth and in mountains and streams [of water] run over it or the wind unearths it and it becomes visible?’ He replied: ‘It is *rikāz*.’ He [also] said: ‘And what is visible to people and left as it is, such as golden idols and visible columns of graphite, all of these should not be [considered] *rikāz*. Rather, it is something for Muslims in general, and it should be dedicated to them and to their

treasury office. No one should take from it except the commander of the faithful, and it [should be] considered as similar to land. No one should take anything from it except with his permission. If he permits someone to [acquire] it, it is [considered] his and no one-fifth share should be [taken] from it.' I asked: '[How about] columns of graphite and the like of which part of them is visible?' He replied: 'Whatever of it can be seen is not [considered] *rikāz*.'

He [Abū Ishāq] said: "I [also] asked him about exhuming graves if they are guided to find something in them. He replied: 'This is a mischievous deed.'" He [Abū Ishāq] said: "I [also] asked him about [the case of] a man whose mount becomes ill and he leaves it, or his weapon or goods make him heavier so he drops them: 'May anyone take anything from that?' He replied: 'No, unless he takes it and returns it back to him, except if he knows that its owner has dropped it so that anyone [else] can take it if he wants. If this is the case, it is for the one who takes it.' I asked: '[What] if a man takes it, then its owner comes [to claim it] and he says: "I left it so that it would be brought to me"?' He replied: 'His claim [would be] valid. But if he says, "I left it so that anyone who wanted could take it," he cannot retract [what he said] about it.' I asked: '[What] if a man at the rear of the army finds a property left behind and he does not know whether its owner [intentionally] dropped it or it fell from him?' He replied: 'If he takes it, he should announce it to be known.' I [Abū Ishāq] asked Sufyān al-Thawrī about exhuming graves when they are guided to something in them. [85] He replied: 'I dislike it.' I asked: 'What do you dislike about it?' He replied: 'Have you been informed that anyone from the past did it?' I replied: 'No.' He replied: 'Therefore, I do not like it.' I asked: 'What would be the status of what has been acquired from that during

war or other than the [time of war]?' He replied: 'Whatever it is acquired in the Muslims' territory from what they captured in enemy territory, whoever acquires it, whether alone or with army combatants, and it was known that it is *rikāz*, it is for him in particular after [taking out] a one-fifth share. And whatever they acquire from that in enemy territory, whether inside the earth or above it, from *rikāz* or something else, it should be [considered] booty [shared] between the one who acquired it and the army. They should share it after [taking out] the one-fifth share. And whatever is found in enemy territory, without knowing if it belongs to Muslims or to the enemy, he should announce it to be known. Either it will be known [to whom it belongs], or otherwise it should be put with the collected booty. And whatever is found in enemy territory and it becomes known that it belongs to a Muslim, it should be considered a found article (*luqṭa*), and therefore it should be made known. If its owner is found [to have it], or he should pay it as charity on behalf of him.'"

Al-Shafi'i said: "If a man finds *rikāz* in an arid land (*mawāt*) such as the Arab arid land, it should be for the one who finds it, and he has [to pay] its one-fifth share. And if he finds it in a utilized land [indicating that] it is owned by the enemy, it should be [considered] booty. And whatever he takes from their homes, he should not have more right to it than the army." (Narrated to me by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "Everything that Muslims acquire in the Territory of War has a value, whether [taken] from the combatants of the enemy people or from what is [found] in deserts, fields, and forests. It should be [put] in the booty and it is not permitted for any man to conceal it. And he should

not unlawfully take it and he should not betray the trust. This is because he is not able to take it except with the soldiers, and he could not reach the place that he reached except with the group of his companions." (The narration of Bishr from Abū Yūsuf.)

[Section 39]

They [Muslim jurists] unanimously agreed that a Muslim captive may ransom himself from the enemy.

[Section 39.1]

They disagreed on the obligation to pay what he guarantees them under duress if he has a way not to pay them after his [making] a guarantee [to them].

Al-Awzā'ī was asked about [the case of] a man being captured and he gives them a promise so that they send him to the Territory of Islam to get his ransom. Otherwise, he would return to the enemy and continue to be their captive, and he will not be able to ransom himself: "Do you think that he should return to them?" He replied: "Yes, he should return to them." (Narrated to me by al-'Abbās from his father from him.)

He [the father of al-'Abbās] said: "He was asked about the Imām: 'Is he obligated to free a Muslim from the disbeliever who brought him and not to send his ransom or to take a weapon if he has one with him?' He replied: 'If the disbeliever has a weapon or property with him, it is not permitted for a Muslim to take it nor to take his Muslim captive from him, whether the Imām or someone else.'"

Al-Thawrī was asked about that. He replied: "If he is able to [pay] the ransom, he should send it to them. But if he is not able to [pay] the ransom, he should not return. And if he makes peace with them by [giving them] a weapon or

a horse, he should not send it to them but should send its value [instead].” (Narrated to me by Mu‘āwiyā from Abū Ishāq from him.)

Al-Shāfi‘ī said: “If the polytheists capture a Muslim and they release him provided that he pay them a ransom by certain date, and they take a promise from him that if he does not pay them the ransom, he will return back to captivity, he should not return to their captivity, and the Imām, if he [the former captive] wants to return, should not let him return. And if they deny releasing him except by [him] giving them a property, he should not give them anything from it because it is a property that they forced him to take it from him unjustly. And if he gives it to them so that he gets something from them, it is not permitted to him except as his payment to them in any case.” (Narrated to us by al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “If people from the enemy ask Muslims for a pledge of security so that they can enter with [Muslim] captives and take their ransom, and the Muslims grant them security based on this [agreement], then they enter the Territory of Islam with Muslim captives but they require a high ransom and say: ‘Either you ransom every man from the Muslims who are with us by [paying] [86] a hundred thousand, more or less, or you let them return with us to the Territory of War,’ the Imām should not return the Muslim captives to the Territory of War but should pay their ransom with what would be paid for people like them. And if they do not accept [the offer], he should prevent them from taking them into the Territory of War. And he should tell them, ‘Take from us the ransom of people like them’” But Abū Yūsuf said: “If they require a high ransom, the Imām should ransom each one of them by [paying] the amount of his blood money. And if they are *mukātab*s, *mudabbars*,

umm walad, or Muslim slaves, he should ransom them by [paying] their price. And if they do not accept [the offer], he should not return them and should not let [the enemy] take them out to the Territory of War."

All of them said: "If he guarantees to them [paying] the ransom willingly and they release him accordingly without forcing him to [pay] the ransom, he should fulfill his promise and [pay] what he guaranteed them. And he is not permitted to deny them what he guaranteed [to them]."

[Section 40]

They [Muslim jurists] agreed unanimously that the Muslims' Imām may ransom Muslim captives from the enemy [by paying] from properties, such as plants or something else, but not weapons and horses.

[Section 40.1]

They disagreed on other things with which it is permitted to ransom them.

Al-Awzā'ī was asked: "May a Muslim captive who is in enemy hands be ransomed with a child who was acquired from them and has already been owned by Muslims?" He replied: "No, because he has already entered into the character of Islam." (Narrated to be by Mu'āwiya b. 'Amr from Abū Ishāq al- Fazārī from him.) "I [Abū Ishāq] asked: '[How about] with a *dhimmī* man?' He replied: 'If the *dhimmīs* accept that, there is no harm. Otherwise, it should not [be permitted].' I asked: '[What if there are] disbelievers whom Muslims have captured and whom [other] Muslims have bought, and the enemy requests to ransom Muslim captives with these captured disbelievers: should the Imām compel their masters to ransom with them?' He replied: 'If he gives them the price and the disbelievers have remained in their faith and have not embraced Islam, I do not see any harm [in doing that].' I asked: '[What if] captives are brought to the Imām and he uses one of them as a guide or says to one of them: "Guide me to reach such and such [a place] and I will release you," or he sends a detachment and gives them an extra share [of booty] and they capture booties and disbelievers: should he ransom

Muslim captives with these disbelievers if he wants?' He replied: 'Yes.' I asked: 'Is this for him [to decide]?' He replied: 'Yes. This [took place] in enemy territory, and he has [the choice] to put them to death if he wants.'"

Abū Ishāq said: "Sufyān [al- Thawrī] said: 'This is not for him [to decide]. We have not heard that anyone did that, and he should not ransom with the detachment's captives except with their [combatants'] permission.'"

Al-Shāfi'ī said: "Muslim captives should be ransomed with all of those captured from them except children if they have been captured and no one from their fathers or mothers is with them. If a child does not have his parents or one of them with him, the rule [concerning] him is the same as that of Muslim people. Also, they should not be ransomed with a *dhimmī* or *mu'āhad*." (Narrated to us from al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "The Imām should ransom them with all of the goods and slaves he has acquired unless the booty has [already] been divided up. If the booty has been divided up, he should ransom them from the Muslims' treasury office. If the enemy rejects any offer except to ransom them with their captured slaves, the Imām should take the slaves from those who have become their [masters] and ransom with them, and he should compensate those from whom he took [the slaves] by [paying] them their price that they willingly accept. And if they reject any offer except to ransom them with *dhimmī* people, the Imām should not ransom [Muslims] with them. And if the Muslims have slaves who have been captured from enemy people or the *dhimmīs* have slaves who have been captured from enemy people, and the enemy wants to ransom the Muslim captives in their hands with the Muslims' slaves and the *dhimmīs*' slaves,

then if they [the slaves] have not embraced Islam, they should ransom [the Muslim captives] with them with the approval of their Muslim and *dhimmī* masters, and the masters should be compensated their price."

[Section 41]

[87] They [Muslim jurists] unanimously agreed that if a Muslim captive who is in enemy hands is able to free himself from them by putting them to death, taking their property, and enslaving their children, he may do that to free himself from them. The same holds if he is in shackles: he may break his shackles and escape from them. And if he is able to take some of their properties, women, or children, or put to death some of their men, and he does, it is permitted for him [to do so].

[Section 41.1]

They disagreed on that if they are the ones who release his shackles and provide him with security.

Mālik was asked about [the case of] a Muslim man who is captured in Byzantine territory: the Byzantines capture him and tie him up, then they untie him later and he escapes from them until he comes to Muslims. He replied: "I do not see any harm in [doing] that. I do not think that he gave them any promise or a covenant. Therefore, I do not hold that he should not escape from them." (Narrated to me by Yūnus from Ashhab from him.)

Al-Awzā'ī was asked about a man who is captured and a promise is taken from him that he not escape, fight, or intend to harm them, then they would release him accordingly: "May he escape?" He replied: "If he gives them a promise, he should fulfill his promise. But if they do not take any promise from him, and he is able to escape, he should do that." (Narrated to me by al-'Abbās from his father from him.)

Al-Awzā'ī [also] said: "If they untie their captive and provide him with security, he should not betray their trust, break his covenant with them, or fight them." (Narrated to me by Mu'āwiya from Abū Ishāq from him.)

"I [Abū Ishāq] asked al-Awzā'ī: 'A captive is with [the enemy] in a fortress that Muslims have reached, or he hears about them in enemy territory and [the enemy] provides him with a pledge security and releases him. Should he guide the Muslims to know their vulnerable [places] while he is still with them?' He replied: 'There is no harm [in doing that].' I asked: 'May he drop to [the Muslims] some of the enemy's weapons or a rope so that they can ascend [the fortress' wall] with it?' He replied: 'No, because it would not be right to betray their trust or act unfaithfully toward them.' I asked: 'Should he escape from them and come to the Muslims and then fight against them with [the Muslims]?' He replied: 'Yes.' I asked: 'May he take from them a mount or a weapon so that he can fight against them with it, or [take] a garment to wear?' He replied: 'No, except out of necessity, and he should leave it in their country.' I asked: 'May he give them a covenant that he not raid against them if they ask him [to do so]?' He replied: 'Yes, if he fears them, then he may raid against them and expiate [for his failure to keep] his oath.' It was said: 'What do you think if he is in shackles or imprisonment and a man from them employs him as a servant to do work for him? Should he put him to death if he is able [to do so] or corrupt his work and betray his trust in doing it?' He replied: 'I do not like it.'"

Al- Thawrī was asked about [the case of] a captive who is in shackles and they untie him and take a covenant from him not to fight with them forever nor raid against them, and that he not escape from them nor betray their trust nor act

unfaithfully against them. He replied: "He should escape from them if he is able [to do so], and he may raid against them and expiate [for the failure to keep] his oath. But he should not act unfaithfully against them nor betray their trust. And if he takes anything from them, he should return it to them. And if they catch him [while attempting to escape], he should fight them. And if he is in shackles with them, there is no harm if he betrays their trust and acts unfaithfully against them." (Narrated to me by Mu'āwiya from Abū Ishāq from him.)

He [Abū Ishāq] said: "He [al- Thawrī] said: 'If those who are with the captive untie him and provide him with security, he should not betray their trust, act unfaithfully against them, or fight them.' He [also] said: 'If a Muslim or a *mu'āhad* guarantees [the enemy] that a captive will not escape, he should not escape if he fears for his guarantor from them if he were to escape. But if a man from the enemy guarantees him, he should escape if he is able [to do so].'"

Al-Shāfi'ī said: "If a Muslim is captured and becomes a captive in the Territory of War either tied, imprisoned, or left in a place untied but unable to leave it to another place, and they do not provide him with a pledge of security nor do they make an agreement with him that they be secure from [his attack], he may take what he is able to [take] from their properties and destroy it, escape from them, and leave with whomever he is able to [take] from their children and women. And if they provide him with a pledge of security, or some of them do, and they take him to their country, and it is known to them through their pledge of security to him, while they have the power [to do so], that he is obligated toward them by being secure from [his attack] even if he does not say so, [then he should honor the pledge of security]. Only [in the case] where they say, 'We are

providing you with a pledge of security, but you do not have to pledge for our security because we are not asking you for a pledge of security': if they say this, the rule concerning it is the same as the first case. He is permitted to act unfaithfully against them, leaving with their properties and destroying them, or leaving by himself. But if they secure him and untie him and make a condition to him that [88] he not leave their country or a country that they name, and they take an oath from him or not, some of the scholars say, 'He should escape,' and others say, 'He should not escape.' And if the enemy captures a Muslim man and they release him and make him manage some of their farms or not, their pledge of security to him is a pledge of security for them from him, and therefore, he should not act unfaithfully towards them and he should not betray their trust. But as for escaping by himself, he may escape. And if he is being sought to be taken [captive], he may defend himself even if he puts to death the one who is seeking him. This is because seeking him to be taken [captive] is a new [occurrence] from the one who is seeking him that is different from the pledge of security, and therefore, he may put him to death if he wants, and he may take his property unless he [the enemy] turns back from his search." (Narrated to us by al-Rabī' from him.)

[Section 41.2]

They [Muslim jurists] disagreed on the rule concerning a Muslim man who buys a captive from among Muslim captives.

Mālik spoke about [the case of] a man who sets out to the enemy for ransom or for trade and he buys a slave or a free [Muslim] or they are given to him. He replied: "As for the slave, his previous master has more right to him if he

pays his price. And if he is given to him, I hold that his [previous] master has more right to him without [paying] anything unless he gives him to the [new master] as a prize [for service or payment]. As for the free [man], [the price] with which he buys [him] is in his debt and he may be pursued for [paying] it, but he should not be enslaved. And if he is given to him, he is [considered] free and he does not have [to pay] anything unless he [the enemy person] gives [the free person] to him as a prize [for payment or something else]. In such a case, it should be considered as if he has bought him [from the enemy].” (Narrated to me by Yūnus from him.)

It was said to al-Awzā’ī: “If a man buys a slave or a free [person] from Muslim captives, what is he obliged to do?” He replied: “The free [person] should pay to him his price, and he should not be enslaved.” (Narrated to me by Mu’āwiya from Abū Ishāq from him.)

He [Abū Ishāq] said: “I asked: ‘[What] if the captive disagrees with the buyer, and the buyer says, “I bought you with such and such [a price],” and the captive says, “You bought me with this [different price]”?’ He replied: ‘What the buyer says should be the valid one.’” He [Abū Ishāq] said: “He [also] said: ‘If the Byzantine commander gives a captive as a gift to a Muslim or *dhimmi*, he is [considered] free and he [the Muslim or *dhimmi*] does not have any [right] over the captive.’”

Al- Thawrī was asked about [the case of] a Muslim or a *mu’āhad* who is captured by the enemy, then a man from them [the Muslims] buys him. He replied: “They are not obligated with anything toward the buyer unless they ask

him to buy them and guarantee to him [paying] the price.” (Narrated to me by Mu‘āwiya from Abū Ishāq from him.)

“I [Abū Ishāq] asked him: ‘[What] if they disagree on the price and the captive acknowledges that he asked him to buy him but he did not specify a timeline for [repaying] the price?’ He replied: ‘The buyer’s view is the valid one. And if the captive says: “I asked you to buy me with such [amount]” and the buyer says: “You asked me to [buy you] with such [different amount],” the valid view is that of the captive.’”

Ibn Abī Layla said: “The buyer’s view [is the valid one].”

Al-Shāfi‘ī said: “If a man enters the Territory of War and finds in their hands a captive or captives, Muslim men or women, and he buys them and takes them out of the Territory of War and he wants to get back from them what he paid, he may not do that: he is [considered to be] volunteering with the purchase and making a gift if he buys free [people] who should not be sold. But if he buys them on their request, he may get back what he paid [to buy them] because he gave [to buy them] on their request.” (Narrated to us from al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “If the enemy captures free Muslim people, then one of the Muslim merchants enters the Territory of War and buys them from the enemy at the request of the captives, then he takes them out to the Territory of Islam, the merchant may [demand] from them the return of the price with which he bought them from the enemy. And if he buys them from the enemy without the request of the captives, then he takes them out to the Territory of Islam, they are [considered] free and there is no obligation on them toward [paying] the price to the merchant; he is [considered to be] volunteering toward

them when he buys them without their request. And if they have captured a *mukātab*, *mudabbar*, or *umm walad*, and then a merchant enters Byzantine territory and buys them on their request from the enemy, then he takes them out to the Territory of Islam, the *umm walad* should be returned to her [original] master, and the merchant may [demand] from her the return of the price with which bought her if she is to be manumitted some day [in the future]; and the *mudabbar* should also be returned to his master, and the merchant may [demand] from the *mudabbar* the return of the price with which he bought him if he is to be manumitted someday. But as for the *mukātab*, he [the buyer] does not have any right over him, and he should continue his contract and pay to his [original] master. And if he fulfills the contract, he becomes free and [then] the merchant may [demand] from him the price with which he bought [89] him. And if he fails [to pay], he [continues to] be a slave and the merchant does not have any right over him or over his master until he is manumitted one day, then the merchant may [demand] from him to return the price with which he had bought him. And if the merchant buys the *mudabbar* or *umm walad* with the request of his master in the Territory of Islam, he may [demand] from his master to return the price with which he bought the *mudabbar*, and he may [demand] from the master of the *umm walad* to return the price with which he bought her. As for the price with which he buys the *mukātab*, he should not [demand] the return of it from the *mukātab* or his master until the *mukātab* is manumitted one day, then he may [demand] from him the return of it. And if the merchant buys them without their permission and without the master's permission, he should not [demand] from the master or any one of them the return of anything, and he should not [demand]

from the *mukātab*, *mudabbar*, or *umm walad* the return of anything after they are manumitted or before their manumission. But if the enemy captures a slave and the merchant buys him, he is [considered owned by] the one who buys him, and the [original] master may take him if he wants by [paying] the price. And if the enemy gives [as a gift] a *mukātab*, *mudabbar*, *umm walad*, or slave belonging to a Muslim merchant, then the merchant takes them out to the Territory of Islam, the merchant does not have any right on the *mudabbar*, *umm walad*, or *mukātab* before they are manumitted or after, and he does not have any right over their [previous] masters.¹⁹⁹ As for the slave, he is [considered] owned by the merchant to whom he was given, and his [previous] master may take him by [paying] his price if he wants. And if the polytheists capture some Muslim boys and they have not [yet] reached puberty, and one of the Muslim merchants enters [the Territory of War] and buys them with or without their permission, he should not [demand] from them, after they become adults or before, the return of anything if they are free, *makātab*s, or *mudabbar*s. And if he buys them with the request of their father, he may [demand] the return of the price from their father. The same holds for *dhimmī* people. If the enemy captures them, they should be ransomed. And if they are captured, they should be, in all such [cases], considered similar to Muslim captives in all that we have [previously] described.”

[Section 41.3]

They disagreed on [the permissibility] for a captive or a *musta'min* to have intercourse with a slave woman of his or with his [free] women captured in enemy territory and on which women are permitted for him to have intercourse with in the Territory of War.

Al-Awzā'ī was asked about a *mudabbara* who is enslaved by the enemy, then her master comes to her having a pledge of security, or if she is an *umm walad* or a free woman. He replied: "If an enemy acquires her, they [enemy people] are more able to have intercourse with her [due to her enslavement] both in secret and in a publicly known [state] than him. It is not right that two people have intercourse with one [woman]; he may only have intercourse with her secretly while her disbeliever husband [may do so] in a publicly known [state]. And if he meets her and she has no husband among them, he should not have intercourse with her until they release her and he can take her out to the Territory of Islam. This is because if he has a child from her, they will have a greater [right to] ownership of him [the child] than he does. They will make him a disbeliever." (Narrated to me from al-'Abbās from his father from him.)

He [the father of al-'Abbās] said: "Al-Awzā'ī said about [the case of] a man who is captured and with him is his concubine: 'If they take her from him, it is not right for him to have intercourse with her in what they perceive as fornication, since they will have intercourse with her in what they perceive as marriage,' [meaning] two would have intercourse with her.'"

Mu'āwiya narrated to me from Abū Ishāq that he said: "I asked Sufyān, al-Awzā'ī, and other than them about [the case of] a Muslim captive who is with enemy people [who are] from the people of the Book:²⁰⁰ 'May he marry from them?' They said: "No, unless he fears committing adultery.' I asked al-Awzā'ī: 'What if he does [marry] and he comes back with her: should they be separated?' He replied: 'No, it is only something disliked for him to do. But if they do [marry], they will remain married.' I asked him: 'If he fears that he might commit

adultery, do you prefer that he marry from them or from Muslim women?' He replied: 'From Muslim women.' I asked: 'Without a legal guardian?' He replied: 'Muslims are her legal guardians.' I asked: 'What if there is with him his wife captured with him? May he have intercourse with her?' He replied: 'It is disliked for him to do so. But if he does, he is not committing a forbidden act, and if he keeps himself [abstinent], it would be better [for him].'"

Abū Ishāq said: "Sufyān [al-Thawrī] said: 'If a Muslim marries a woman from them, he should ask for her hand from her legal guardian among them.'" He [Abū Ishāq] said: "I asked him [al-Thawrī]: 'If a man is captured with his wife, may he have intercourse with her?' He replied: 'It is disliked for him [to do that] [90] for the sake of the [possible] child. But if he wants, he may do that and deny [having] the child.' I asked: 'If a man from them marries his wife and he [Muslim husband] is able to have intercourse with her, may he do that?' He replied: 'He should not have intercourse with her.'"

He [Abū Ishāq] said: "I asked al-Awzā'ī and Sufyān [al-Thawrī] about [the case of] a man who is captured with his concubine: 'May he have intercourse with her if he wants?' He replied: 'No, because she is in their ownership and because they have acquired her [as a slave].'"

He [Abū Ishāq] said: "I asked Sufyān: 'If he buys from them a concubine, may he have intercourse with her?' He replied: 'Yes, and he may deny [having] the child.'" He [Abū Ishāq] said: "Al-Awzā'ī said: 'It is disliked for him [to do so] for the sake of the child.' I asked: '[What] if he marries from them, then he brings her with him here and they disagree on the dowry?' He replied: 'He should ask the Imām about the dowry of one like her, and if he knows that, it should be

applied to him. Otherwise, the husband's claim should be the valid one.” He [Abū Ishāq] said: “Sufyān said: ‘If they disagree, she should get the dowry of one like her.’”

Al-Shāfi‘ī said: “A man may have intercourse with the *umm walad* and his concubine in enemy territory while the enemy does not have anything over Muslims.” He [also] said: “If a man buys his concubine from the polytheists after they acquired her, I prefer if he not have intercourse with her until he makes sure she is not pregnant, as he should not have intercourse with her if she got married with an illegal marriage or had intercourse until he makes sure that she is not pregnant, and she [already] became [in the ownership] of the one who had permitted [himself] to have intercourse with her.²⁰¹ The same holds for the case of a [free] woman and a *mudabbara*.” (Narrated to us from al-Rabī‘ from him.)

Abū Ḥanīfa and his companions said: “If the enemy captures a concubine of one of the Muslims, then the concubine's master enters enemy territory with a pledge of security, he should not unlawfully take his concubine from them or have intercourse with her because owning her became their right when they acquired her. And if the enemy captures a Muslim man's free woman or they capture a mother of his child or a *mudabbara* or a *mukātaba*, then this Muslim enters enemy territory with a pledge of security, he may, if he meets his [slave] wife, have intercourse with her. And if he meets his *umm walad* or *mudabbara*, he may have intercourse with her. And if he meets his *mukātaba*, he may take her out to the Territory of Islam. This is because if the enemy [people] were to embrace Islam [while] having them, they [the women] would be taken from them and there would be no right to own them. And if the master of the concubine that the enemy

has captured is also captured, he may take her and steal her from them, but he should not have intercourse with her until he takes her to the Territory of Islam. The same holds if her master enters the Territory of War without the Imām: he may steal her from them and he may overcome them to [take] her, but he should not copulate with her until he takes her to the Territory of Islam. And if he enters with a pledge of security, he should not take her.”

[Section 41.4]

They disagreed on the permissibility for Muslim captives and their *masta'mins* who are with the enemy in their territory, in which Muslim rule does not apply, to fight alongside the enemy against another enemy.

Mālik was asked about [the case of] captives who are in enemy territory and those who acquired them in their hands say to them, “Fight with us our enemy, and if we conquer them, we will release you.” Mālik replied: “They should not do that.” He [also] said: “How can a man fight based on this [justification]? Muslims should fight [only] those who are invited [first] to Islam and those [follow] what they are inviting for.²⁰² A Muslim should not shed his blood except for a just [cause] and should not shed the blood [of another person] except for a just [cause].” (Narrated to me by Yūnus from Ibn Wahb saying, “I asked him about it.”)

It was said to Al-Awzā'ī: “Muslim captives whom the enemy wants to fight another enemy alongside them: [what should they do?].” He replied: “Maybe they want them to do that and so make a conditioned [promise] to them that if they conquer [their enemy], they will release them and they may return to the territory of Islam. If they make [such] a conditional [promise], I do not see any

harm in their fighting alongside them. Their intention is to return to the Territory of Islam. But if they do not make such a conditional [promise], they should not fight alongside with them unless they fear that their blood [will be shed].”

“I [Abū Ishāq] asked: ‘What is disliked about their fighting alongside them?’ He replied: ‘. . . because then they would be strengthened with those. And if there is booty, it will be for them and [there is] no good in that.’ I asked: [91] “If they are coerced to go out [for combat], may they fight if they face [their enemy]?’ He replied: ‘No, but they should escape.’ I asked: ‘What do you think if they make to them a conditional promise [according to] what you said [before], then they acquire booty and they [already] fought alongside them? Should they bring them what they have acquired or keep it [for themselves]?’ He replied: ‘They should keep it unless they make a condition to them that they bring them the booty that they acquire or they let them take it and bring it to them.’” (Narrated to me by Mu‘āwiya from Abū Ishāq from him.)

He [Abū Ishāq] said: “I asked Sufyān al-Thawrī about that. He replied: ‘There is no harm if they fight alongside them.’ I asked: ‘To what should they invite them?’²⁰³ And if there is booty, it will [provide them with more] power over Muslims.’ He replied: ‘No, there is no harm for them [to fight]. All of them are enemies.’ Then he doubted [this opinion] later.”

Al-Shāfi‘ī said: “If a group of Muslims are captured and the polytheists use their support against [other] polytheists like them to fight with them, it has been said, ‘They may fight against them, since it has [also] been said that al-Zubayr and his companions in the land of Abyssinia fought polytheists alongside [other] polytheists. And the one who held this opinion [also] said, ‘What forbids

[them from] fighting alongside them and shedding the blood of those whom they are fighting is permitted [due to] their polytheism.' And if someone says, 'Fighting against them [is forbidden] for several reasons: one of them is that it is incumbent on any Muslim who is victorious over polytheists and gains booty to give the one-fifth share to the people [who deserve it], and they would be scattered in [different] countries and this [Muslim captive] would not find a way to partition the one-fifth [share] when he got the booty to give it to the Imām in order to distribute it; and [secondly] it is [also] incumbent on them if they fight the people of the Book and [the latter] give the poll tax that they refrain from [shedding] their blood,' it is a [considered] point of view. But if they do not coerce them to fight against [their enemy], I prefer that they do not fight." (Narrated to us by al-Rabī' from him.)

Abū Ḥanīfa and his companions said: "If a group of Muslim people enter the Territory of War with a pledge of security, then the people of that territory are raided by other enemy people, the *musta'min* Muslims should not fight alongside them except if they fear for their lives. This is because the rule of the enemy people is the dominant one. And if the enemy people with whom are the *musta'min* Muslims raid a group of Muslims and capture them and take their properties, and they are empowered by [the captives and the properties] over the *musta'mins*, the *musta'mins* should invalidate the pledge of security that was given to them by the enemy people and save the Muslim captives and their properties from those who have raided them. If they have the power to do that, they should do it."

[Section 41.5]

They disagreed on what is permitted for a captive to do.

It was said to al-Awzā'ī: "A Muslim woman is captured and they ask her to have sexual intercourse with them." He replied: "She should endure the beating." Then he said: "For how long should she endure?"²⁰⁴ (Narrated to me by Mu'āwiya from Abū Ishāq from him.)

He [Abū Ishāq] said: "I asked: 'If she fears being killed, [may] she agree to [have intercourse with them]?' He replied: 'What can she do? As for her, she should not come to them except under coercion and without an open heart.'"

He [Abū Ishāq] said: "Sufyān said: 'There is no permission for her to do what they want unless she is coerced to do so.'" He [Abū Ishāq] said: "Al-Awzā'ī and Sufyān said: 'There is no excuse for a captive to guide [the enemy] toward a [Muslim] vulnerable place even if he is to be put to death.' I asked al-Awzā'ī: 'A man is captured, and he is given a choice between slaughter and disbelief: [what should he do?]' He replied: 'Someone narrated to me that he had heard Khaṣīf narrating from Ibn 'Abbās that he said: 'The permission is in speech and not in refraining from [doing] an [obligatory] deed, such as [refraining from] drinking wine (*khamr*) and eating pork, or if he prays toward other than the *qibla*.'"

"I [Abū Ishāq] asked Sufyān: 'A Muslim is captured and they want to put him to death, and it is said to him: 'Expose your neck.' Should he expose his neck if he fears that if he does not do that, he will be mutilated?' He replied: 'I do not like for him to help [them] to [inflict injury or death] on himself.'"

"I [Abū Ishāq] asked al-Awzā'ī about that and he replied: 'I do not see any harm [in doing that] and I do not think that he is helping [them] to [inflict death] on himself if he fears that if he does not do that, he will be mutilated or injured

until he dies.' I asked: 'A man is captured with his son and they want to put them to death, and he says: 'Start with my son before me,' in order for him to religiously mourn his son before he himself dies. Do you think that he is helping [them] to kill his [son]?' He replied: 'No,' and Sufyān disliked that."

"I [Abū Ishāq] asked [92] al-Awzā'ī: '[How about the case of] a small group [of Muslims] who are captured together and they want to put them to death, and one of them is terrified about being put to death so he says: 'Start with them before me,' referring to some of his companions?' He replied: 'It is the worst thing that he could say, but he has not reached the point where he would be helping to put to death his [companion].' I asked: 'What if he says to the one who is putting him to death: 'Take my sword because it is sharper than yours' in order that he put him to death with it if he hopes that it will be [a quicker way] to end his life?' He replied: 'I do not like that.' I asked him: 'What if he wants him to drink wine or kiss crosses?' He replied: 'He should not do that.'"

Al-Shāfi'ī said about [the case of] a captive who is coerced into polytheism but his heart is settled on belief: "His wife should not be divorced from him even if he utters [words] of polytheism, and it should not be forbidden for him to inherit from Muslims, and they should not be deprived of their inheritance from him if it is known that he said that under duress. And their knowledge of that comes from him saying this before, during, or after saying [the words of polytheism], 'I said that under duress.' The same holds if they force him to do anything without harming anyone, such as eating pork or entering a church and he does so: he may do that. And I dislike for him to drink wine because it prevents him from [performing the] prayer and remembering God if he becomes

drunk. But this does not mean that it is forbidden for him [to drink wine under duress]. If [the punishment] for polytheism should not be applied to him due to coercion, the punishment for committing less than polytheism from acts that do not harm anyone should not be applied to him. But if they force him to put a Muslim to death, he does not have the right to put him to death.”

He [also] said about [the case of] a man who is captured and then he embraces Christianity and he has a wife, and a group of Muslim people pass by him and he looks at them while in the fortress and says: ‘I embraced Christianity only with my tongue and I pray [the Muslim prayer] when I am alone’: “This [person] should be [considered] a coerced [one] and his wife should not be divorced from him.” (Narrated to us by al-Rabī‘.)

Notes

Introduction:

¹ Qur'ān 9:19, 29:6, and 5:54.

² See, for example, the collection of Muslim b. Ḥajjāj, *Ṣaḥīḥ Muslim* (Cairo: Dār al-Fikr, 1977), vol. 2, 57-69.

³ Bernard Lewis, *Islam and the West* (New York: Oxford University Press, 1993), 9; idem, *The Political Language of Islam* (Chicago: The University of Chicago Press, 1988), 72. In this book, Lewis observes that only some medieval Shī'ī theologians expressed a moral and spiritual meaning of *jihād*.

⁴ For an analysis of the different senses in which the term *jihād* is used in the Qur'ān, see Richard Bonney, *Jihad: from Qur'an to bin Laden* (New York: Palgrave, 2004), 21-33.

⁵ Ibn Qayyim al-Jawziyya, *Zād al-Ma'ād fī Ḥady Khayr al-'Ibād* (Cairo: al-Bābī al-Ḥalabī, 1970), vol. 2, 44ff.

⁶ Ibid.

⁷ Ibid., 43.

⁸ Ibid., 42.

⁹ See Ibn Hishām, *Sīrat al-Nabī (The Life of the Prophet)* (Cairo: al-Maktaba al-Tijariyya al-Kubra, n.d.), vol. 3, 337. The reference here is to Muhammad's refusal to put to death 'Abdullah b. Ubay despite the latter's conspiracy against Muslims.

¹⁰ Ibid., 25.

¹¹ *Siyar* is the Arabic plural of *sīra*. See the provided "Glossary of Arabic Terms."

¹² John Kelsay, *Islam and War: A Study in Comparative Ethics* (Louisville, Kentucky: 1993), 36.

¹³ This description of al-Ṭabarī's *ikhtilāf* is cited by Frederick Kern. See the following note.

¹⁴ Frederick Kern, ed., *Ikhtilāf al-Fuqahā' lil-Ṭabarī* (Cairo: al-Muwsu'āt, 1902), 7.

¹⁵ This work is concerned with the religious and legal status of slaves who, upon the death of their masters, are manumitted. Cf. *Book of Jihād*, section 18.1 (herein translated).

¹⁶ The whole of *The Book of Jihād* consists of 122 "sections" as numbered by Schacht. I adopt in this translation a more topical method to provide section numbers as explained in the Translator's Introduction.

¹⁷ Muḥammad ibn Jarīr al-Ṭabarī, *Ikhtilāf al-Fuqahā': The Books of Jihād, Jizya, and Ahkām al-Muḥāribīn*, ed. Joseph Schacht (Leiden: E.J. Brill, 1933). (Arabic text and notes; introduction in German.)

¹⁸ Joseph Schacht, *Das Konstantinopler Fragment Des Kitāb Ihtilāf Al-Fuqahā'* (Leiden: E.J. Brill, 1933).

¹⁹ See, for example, the *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Layla* of Abū Yūsuf; the *Kitāb al-Hujaj* of al-Shaybānī; and the *Kitāb Ikhtilāf Mālik wal-Shāfi'ī* and *Kitāb Ikhtilāf 'Alī wa 'Abd Allāh ibn Mas'ūd*, both part of al-Shāfi'ī's massive *Kitāb al-Umm*.

²⁰ Section numbers used in this translation are listed by assigning a whole number to a case of juristic consensus followed by decimel numbers that correspond to cases of disagreement.

²¹ The names of these narrators are placed in parentheses in the translation.

²² See Kern, *Ikhtilāf*, 7.

²³ *Ibid.*, 13.

²⁴ See the discussion of these terms under "Notes to the Present Translation" included in the Introduction.

²⁵ Ibn Hisham, *Sīrat al-Nabī*, vol. 3, 366.

²⁶ See, for example, Yūsuf M. 'Abd al-Maqṣūd, *Al-'Alāqāt al-A'imma wal-Khaṣṣa fīl-Islām (Public and Private Relationships in Islam)* (Cairo: Sayyid Maḥmūd, 1978), 92-4.

²⁷ For a discussion of this view, see Muḥammad R. 'Uthmān, *Al-Ḥuqūq wa'l-Wājibāt al-Shar'iyya fīl-Islām (Religious Rights and Obligations in Islam)* (Cairo: al-Sa'āda, 1975), 170-5.

²⁸ *Ibid.*, 168.

²⁹ *Ibid.*, 178.

³⁰ Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: Johns Hopkins University Press, 1966), 7.

³¹ Joseph Schacht, *The Origin of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1975), 31.

³² Joseph Schacht, *Das Konstantinopler Fragment*, vii.

³³ Azami, M. M., *On Schacht's Origins of Muhammadan Jurisprudence* (New York: John Wiley, 1985).

³⁴ See 'Abd al-Khāliq al-Nawawī, *Al-'Alāqāt al-Duwalīyya wa'l-Nuẓūm al-Qaḍā'iyya (International Relations and Judicial Systems)* (Beirut: Dār al-Kitāb al-'Arabī, 1974), 95-113.

³⁵ *Ibid.*, 120-22.

³⁶ 'Abd al-Karīm Zaydān, *Majmū'at Buḥūth Fiqhiyya: Al-Sharī'a al-Islāmiyya wal-Qānūn al-Dawī al-'Ām (Anthology of Studies in Jurisprudence: Islamic Law and International Law)* (Baghdad: Al-Quds Library, 1975), 84.

³⁷ Muḥammad Abū Zahra, *Uṣūl al-Fiqh (The Principles of Jurisprudence)* (Cairo: Dār al-Fikr al-'Arabī, 1956), 108-9.

³⁸ See Qur'ān 9:5, 14, 36; and 47:4, 35 for those verses that call for fighting; and 2:191, 209; 3:159; and 8:62 for those advocating the peaceful treatment of disbelievers.

³⁹ For an example of the "Meccan" verses directing Muslims to refrain from using force against the polytheists, see Qur'ān 32:33. Also, an analysis of Shaltūt's argument is provided by Rudolph Peters in *Jihad in Classical and Modern Islam: A Reader* (Princeton: Markus Wiener, 1996), chap. 8.

⁴⁰ For the complete text of the peace agreement with the people of Najrān, see Muḥammad ibn al-Ḥasan al-Shaybānī, *Shaybānī's Siyar*, trans. Majid Khadduri (Baltimore: Johns Hopkins University Press, 1966), 278-280.

⁴¹ See, for example, an analysis of the effect on the people of Egypt of the tribute taken by their Sasanian overlords, see Ṣubḥī al-Ṣāliḥ, *Dirāsāt fīl-Nuẓūm al-'Arabiyya (Studies in Arabic Political Systems)* (Beirut: Dār al-Fikr, 1972), 364-5.

⁴² *Ibid.*, 220-21.

⁴³ Wahba al-Zuhaylī, *Al-'Alāqāt al-Duwaliyya fīl-Islām (International Relations in Islam)* (Beirut: Al-Risāla, 1981), 114-5.

⁴⁴ Ibid., 32-3.

⁴⁵ For the translation of Qur'ānic passages quoted in the text, I have used *The Meaning of The Holy Qur'ān* by Abdullah Yūsuf 'Alī (Beltsville, MD: Amana Publications, 1997).

⁴⁶ Scholars will note that the original usage of *mushrikūn* in the Qur'ān refers mainly to the polytheists in Mecca and to Arab pagans in general, and in several verses in the Qur'ān, the word *mushrikūn* comes repeatedly after *ahl al-kitāb* (People of the Book), indicating different categories of non-Muslims, since the People of the Book (Jews and Christians) were, of course, not pagans. See Qur'ān 98:1.

⁴⁷ Webster's New World College Dictionary, 3rd ed. (1997), s.v. "disbelief" and "unbelief."

⁴⁸ In its primary usage, *'ilj* referred to non-Arabic disbelievers; later it was used generally for any disbeliever. See Muḥammad Rawwās Qal'ajī, comp., *Dictionary of Islamic Legal Terminology* (Beirut: Dār al-Nafā'is, 1985), 319.

⁴⁹ al-Shaybānī, *Shaybānī's Siyar*, 299.

⁵⁰ Qal'ajī, *Dictionary*, 379.

Text:

⁵¹ Here there is a break in the text. Apparently, al-Ṭabarī moves from his Introduction to the first topic of consensus or disagreement among Muslim jurists.

⁵² Badr was the place where the first major battle between the Muslims in Medina and the polytheists of Mecca occurred in the third year of the *hijra* of Muḥammad and his companions from Mecca to Medina. See Ibn Hishām, *Sīrat al-Nabī (The Life of the Prophet)*, vol. 2, 266ff.

⁵³ In this opening sentence to Section 1.1, al-Ṭabarī does not use the phrase "in the time of the jurists"; however, the context of the passage indicates that this is what he means.

⁵⁴ From *al-khazar*, meaning, literally, "small eyes," it refers to a certain nation of Asian people. See Gergia al-Shuwairi, *Mu'jam al-Ṭālib (Student Dictionary)* (Beirut: al-Shuwairi, 1973), 237.

⁵⁵ In al-Shāfi'ī's *al-Umm (The Mother [of Jurisprudence])*, the blood money of a Jewish or Christian protected non-Muslim (*dhimmī*) killed by a Muslim would be one-third of the blood money of a Muslim, while the blood money of a Zoroastrian would be eight hundred *dirhams* (which was expected to always be less than one-third); but according to Abū Ḥanīfa, the blood money of a Jewish, Christian, or Zoroastrian *dhimmī* would be the same as that of a Muslim, and the Muslim who committed the crime should also be subject to the fixed punishment. See Muḥammad b. Idrīs al-Shāfi'ī, *al-Umm* (Beirut: Dār al-Fikr, 1990), vol. 4, 338-9.

⁵⁶ Presumably so as to avoid killing or injuring the Muslim children.

⁵⁷ Expiation (*kaffāra*) for the unintentional killing of a Muslim is specifically mentioned in the Qur'ān (4:92):

Never should a believer kill a believer, except by mistake; and whoever kills a believer by mistake, it is ordained that he should free a believing slave and pay blood money to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the

freeing of a believing slave (is enough). If he belonged to a people with whom ye have a treaty of mutual alliance, blood money should be paid to his family, and a believing slave be freed.

⁵⁸See Mālik b. Anas, *al-Muwatta'* (The Well-Trodden [Book]), vol. 2, 627 (Beirut: Dār al-Fikr, 1994).

⁵⁹Ibid., 677.

⁶⁰Al-Awzā'ī's comment here is not very clear. How a Muslim could feel secure with or have trust in the disbeliever is not explained by al-Awzā'ī, but it is possible that the jurist meant performing some action — such as asking the disbeliever to swear or to demonstrate his innocence — so that the Muslim could grant him a pledge of security (*amān*).

⁶¹See Ibn Hishām, *Sīrat al-Nabī*, vol. 2, 265.

⁶²Ibid., vol. 3, 366-368.

⁶³By using the term *kharāj*, al-Awzā'ī might have meant the exact land-tax taken by Muslims on disbelievers' agricultural lands due to conquest or a forced peace agreement, or he might have used the term to refer to the general tribute (*jizya*) taken from disbelievers, as many jurists did sometimes use *kharāj* to mean the poll-tax. See Qal'ajī, *Dictionary*, 194.

⁶⁴Recorded by al-Ṭabarānī in *al-Mu'jam al-Kabīr* (*The Long Lexicon*), Ibn Mājah in *al-Sunan*. See, for example, Ibn Mājah, *al-Sunan* (Baghdad: Maktabat al-Muthannā, 1973), vol. 3, 229.

⁶⁵Suggestive of the Muslims' need for the peace agreement is a technical phrase used by al-Shāfi'ī and other jurists: *illā 'alāl-naẓar lil-muslimīn* (except out of consideration for the needs of Muslims), which indicates the significant need for peace due to the enemy's power or other factors. For a detailed explanation, see al-Shāfi'ī, *al-Umm*, vol. 2, 199-200.

⁶⁶Ibn Hishām, *Sīrat al-Nabī*, vol. 3, 389.

⁶⁷See al-Shāfi'ī's *al-Umm*, vol. 2, 202.

⁶⁸The previous Qur'ānic verse (9:2) reads:

“Go ye, then, for four months (as ye will), throughout the land, but know yet that ye cannot frustrate Allah (by your falsehood), but that Allah will cover with shame those who reject him.”

⁶⁹See Ibn Hishām, *Sīrat al-Nabī*, vol. 4, 38.

⁷⁰The Arabic term used by al-Ṭabarī for volunteer Muslim warriors is *muṭṭawwi'a*. In many cases when the Muslim army was facing an enemy force at a frontier city, many volunteer combatants from the city itself joined the army. This is, of course, understandable because participating in *jihād* is considered a *farḍ kifāya*, an obligation on Muslims in which if a group fulfills it, it is not obligatory on the rest of the community. Thus, it is expected that the able-bodied men of the frontier city would volunteer to provide enough troops rather than calling on people from distant places to fulfill the duty of facing the enemy in combat. For further information on the role of volunteers in medieval Muslim armies, see Michael Bonner, *Jihad in Islamic History* (Princeton: Princeton University Press, 2006), 114-116.

⁷¹The *wālī*, provincial governor, has a certain amount of authority from the Imām to decide on such matters, but the Imām has the final word.

⁷²Here the Ḥanafī view is clearly different from that of al-Shāfi'ī because Abū Ḥanīfa and his companions do not restrict this kind of peace agreement to only four months.

⁷³ Thus, the Ḥanafī view accepts a one-time payment to an enemy state but not continuous annual payments.

⁷⁴ Here is another lacuna in the text; Joseph Schacht notes: "Several pages were ruined in the original manuscript, except one page that does not match." See Schacht, f.n. 33.

⁷⁵ Since this part of the text has not survived, a section heading has been inserted for clarity.

⁷⁶ The Muslim military camp usually had non-combatants who were stationed at the back of the camp to provide services to the combatants. Those supportive non-combatants might include women, slaves, servants, and people of needed vocations.

⁷⁷ The reason for not giving a share from the booty to a boy or an insane person is apparently their lack of free judgment to join the army. Both are considered unfit for military service.

⁷⁸ The topic of this section is based on an implicit dependence on Qur'ānic verses in which Muslim combatants are instructed to keep fighting without retreat an enemy force that has twice the number of combatants than the Muslim force. Beyond that, the Muslim combatants, under the leadership of their commander, have the choice of retreat and disengagement from battle. See, for example, Q. 3:155.

⁷⁹ Umar refers here to the Qur'ānic verse, 8:16, which will be mentioned later in the text.

⁸⁰ Another break in the text; Joseph Schacht notes: "Some pages ruined in the original manuscript. In [al-Shāfi'ī's] *al-Umm* the text continues thus: 'I prefer that they not be considered sinners.'" See Schacht, f.n. 55.

⁸¹ Since this part of the text has not survived, a section heading has been inserted for clarity.

⁸² Schacht's note (65): "This [fragment] is a saying by al-Shāfi'ī, from *al-Umm* (4:108): 'The people who pay the poll-tax [*ahl al-jizya*] are different than those who do not pay the poll-tax; and therefore it is not allowed for . . .'" [text now continues].

⁸³ Since the enemy people invalidated the truce with Muslims or with *dhimmīs*, they, according to al-Shāfi'ī, should be subject to punishment according to Islamic rulings for whatever slaying or injuring of Muslims or *dhimmīs* they have committed. Al-Shāfi'ī assumes that one might object to his judgment by saying that enemy combatants should not be subject to the rules of criminal punishments that are applied only to Muslims. An enemy combatant, for example, can be forgiven for putting to death Muslims during combat if he is captured by the Muslim army. But al-Shāfi'ī uses analogy to compare the case of such enemy people with the case of *dhimmīs* committing such crimes, which is to apply the punishment according the law of Islam. By committing a crime of murder, for example, a *dhimmī* would invalidate his agreement with Muslims and therefore by virtue of this invalidation, he would be subject to the punishment.

⁸⁴ The point here is that the case of a protected non-Muslim (*dhimmī*) is similar to the case of a Muslim who commits, for example, the crime of murder. He should be punished, but his crime does not invalidate his inclusion within the Muslim community.

⁸⁵ Malatya was one of the cities in the northern Muslim-Byzantine frontier. Today it lies in the modern country Turkey.

⁸⁶ *Al-khawārij* is an Islamic sect that was established by those Muslims who rebelled against both Alī b. Abī Ṭālib and Mu'āwiya b. Abī Sufyān; later they developed beliefs and practices distinctly different from either the Sunnī or the Shi'ī traditions. See *The Encyclopaedia of Islam*, 2nd edition (CD) (Leiden: Brill Publishing Company, 2003), "*Khawārij*."

⁸⁷ The Arabic word *maṭmūra* refers to any underground chamber that is used for housing, as a prison, or as a place to store weapons. See Edward Lane, *Arabic-English Lexicon* (Beirut: Library of Lebanon, 1968), vol. 7, 422-423.

⁸⁸ Some of the words are missing in the original manuscript.

⁸⁹ It is clear that the Ḥanafī view as to whom a pledge of security can be extended is different from al-Awzā'ī's. While al-Awzā'ī includes all of the companions of an enemy person given the pledge, Abū Ḥanīfa and his students extend the validity of the pledge only to the dependants of the one granted the pledge.

⁹⁰ This *ḥadīth* is recorded by Abū Dāwūd in *al-Sunan*, al-Tirmidhī in *al-Sunan*, and Muslim in *Ṣaḥīḥ Muslim*. See, for example, Muslim, vol. 3, 89. This is an instance in which Abū Ḥanīfa and his companions clearly depend on a Prophetic tradition to reach a legal ruling. Since this tradition presents less fortunate Muslims as capable of protecting others, people of disability can grant a pledge of security to an enemy person.

⁹¹ The jurists' view on the question of doubt is a case that illustrates a dependence on the general principles of Islamic law and its spirit. No one among the jurists cites a Qur'ānic verse or a Prophetic tradition on this case, but it is understood that an accused person should be given the benefit of the doubt. Since the Muslim army could not identify the person or a group of persons to whom a pledge of security was given, no one among the group of enemy combatants is put to death or injured based on doubt.

⁹² See Mālik, *al-Muwatta'*, vol. 1, 633, under the topic "Things for Which the One-Fifth Is Not Obligatory." The one-fifth share taken from the booty by the Imām is mentioned in the Qur'ān (8:41).

⁹³ Al-Shāfi'ī's reference to the oath is based on the use of oath-taking as a method to decide the truth in a legal dispute among Muslims.

⁹⁴ The use of the testimony of two adult Muslims is used in Islamic judicial practice as a way of verification. See Quran 2:282.

⁹⁵ Apparently, al-Awzā'ī is responding to the question as to whether the Imām has the right to deny an enemy person a pledge of security. By saying "it is forever," he is making the point that the Qur'ānic verse is applicable in all times, and therefore the Imām cannot deny giving such a pledge.

⁹⁶ Al-Awzā'ī's meaning here is not certain; it is possible that he meant "until the secured enemy person returns to the Territory of War, then his pledge of security is no longer valid."

⁹⁷ This is based on the understanding that a *dhimmī* loses his status of protection if he joins the enemy in their territory.

⁹⁸ It is clear from al-Awzā'ī's reasoning that he regarded the practice of demanding the poll-tax from disbelievers to be an action that provided security for Muslims and as part of the notion of justice in Islam.

⁹⁹ It is not exactly clear what "reaching the road" means; it might refer to "reaching the border of the Territory of War."

¹⁰⁰ Here al-Shāfi'ī is referring to his comments found in section 6.1 of *The Book of Jihād* (*supra*).

¹⁰¹ In the original manuscript, the Arabic verb *yaqbal* ("to accept") is used here by al-Ṭabarī, whereas in *al-Umm* (vol. 4, 201), al-Shāfi'ī himself employed the verb *yaqtul* (i.e., "to kill").

According to my judgment, the latter verb fits the intended meaning better, and therefore the sentence should read: "God knows better than you do or [better] than the one who puts him to death from [among] you . . ." etc. Al-Shāfi'ī is explaining in this passage that "his secure place" in Q. 9:6 refers to being secure from the Muslims' attack rather than from anyone else.

¹⁰²Such as the blind, crippled, women, etc.

¹⁰³It is expected from the one who asks for asylum that he would most likely exit the Territory of Islam by going to a destination that is different from his place of entrance.

¹⁰⁴This is because the poll-tax is a yearly-paid tax.

¹⁰⁵My usage of "pagan" here specifically refers to idol worshippers because al-Shāfi'ī uses the Arabic *mushrik* (polytheist) to denote anyone who disbelieves in the Islamic message even if this person is among the People of the Book.

¹⁰⁶The sacredness of the Grand Mosque and the city of Mecca and their immunity from becoming a war zone are mentioned in the Qur'ān (29:67).

¹⁰⁷This Prophetic tradition is recorded by al-Bukhārī in *al-Ṣaḥīḥ* and by Muslim in his *Ṣaḥīḥ*. See, for example, *Ṣaḥīḥ Muslim*, vol. 2, 99. Furthermore, Muslim narrates a *ḥadīth* on the authority of Jābir b. 'Abd Allāh, saying: "I heard the Messenger of God saying: 'It is not permitted for anyone to carry a weapon in Mecca'" (vol. 2, 98).

¹⁰⁸See Ibn Hishām, *Sīrat al-Nabī*, vol. 4, 310. Based on this Prophetic tradition, al-Shāfi'ī differentiates between the sanctity of the city of Mecca during a time of war and the punishment of a person who aggresses against Muslims. On the other hand, Abū Ḥanīfa and his companions express a more literal understanding of the sanctity of Mecca and its mosque based mainly on Qur'ānic verses.

¹⁰⁹Some of the words are absent in the original manuscript.

¹¹⁰Since this part of the text has not survived, a section heading has been inserted for clarity.

¹¹¹Al-Awzā'ī's lone opinion does not differentiate between the case of having such a person in the Territory of Islam or in the Territory of War.

¹¹²See Ibn Hishām, *Sīrat al-Nabī*, vol. 3, 367. This agreement was part of the treaty of Ḥudaybiya.

¹¹³*Ibid.*, vol. 4, 24ff.

¹¹⁴Al-Awzā'ī's reference to 'emigration to God' is based on his analogical reasoning in which he makes a comparison with the early Muslim emigration to Medina (622 C.E.). The issue of the fate of their properties in Mecca became crucial in the conflict between the Muslims in Medina and the Meccan polytheists who confiscated these properties.

¹¹⁵This view of confiscating enemy lands conquered by the Muslim army was challenged by the second caliph, 'Umar b. al-Khaṭṭāb, when he rejected dividing the land of Iraq among the combatants. Instead, he let their original non-Muslim owners keep their properties and pay a land tax (*kharāj*). See Muhammad Hamidullah, *Muslim Conduct of State* (Lahore: Muhammad Ashraf, 1977), 242.

¹¹⁶This section of juristic consensus reflects the reality of having many merchants traveling from the Byzantine territory to the Territory of Islam and vice versa. The jurists here limit the power of the Imām to prevent giving a pledge of security to a merchant to enter the Islamic state for the need of trade.

¹¹⁷See Ibn Hishām, *Sīrat al-Nabī*, vol. 2, 497.

¹¹⁸The Arabic word used here is *barādhīn* (plural of *birdhawn*), which refers to an animal larger than a donkey but smaller than a horse; sometimes it refers to the "Turkish horse." See Lane, *Lexicon*, vol. 1, 320-321.

¹¹⁹The Arabic verb used here is *dabbara*, and it refers to the slave "left" by his master on the condition that if the master dies, the slave becomes free. See Qal'ajī, *Dictionary*, 126.

¹²⁰Al-Awzā'ī refers here to the Muslim obligation of alms-giving (*zakāt*), one of the five pillars (*arkān*) of Islam. A rate of 2.5% is calculated as the amount of *zakāt* for one year, as he demonstrates further on.

¹²¹The monetary value of one *dīnār*, a gold coin, equals 4.24 grams of gold. See Qal'ajī, *Mu'jam Lughat al-Fuqahā'* (*Dictionary of Juristic Terms*) (Karachi: Idaratul Qur'an, n.d.), 212.

¹²²According to Islamic law, an amount less than twenty *dīnārs* is not taxable.

¹²³Abū Ḥanīfa's comment might mean that he does not apply in this case the analogy based on textual cases in which only the testimony of two trustworthy Muslims are acceptable.

¹²⁴The stipulated punishment for fornication (*zinā*) is found in the Qur'ān (24:2), namely, one hundred lashes, but stoning is only mentioned in some of the *ḥadīths* as the assigned punishment more specifically for adultery. Some modern reformers provide new interpretations for such Qur'ānic verses to challenge the traditional view of literal interpretation.

¹²⁵Cutting off the hand for stealing is a stipulated punishment in the Qur'ān (5:38).

¹²⁶The stipulated punishment for false accusation of fornication, specified in the Qur'ān (24:4), is eighty lashes.

¹²⁷This section indicates that Abū Ḥanīfa and his companions do not approve of applying such punishments in the Territory of War unless the Imām, or his representative, oversee their application by being present in the Territory of War.

¹²⁸According to the agreement called *mukātaba*, the slave would pay his master a certain amount of money in installments over a period of time so as to buy his freedom. See Qal'ajī, *Dictionary*, 455.

¹²⁹This is a clear statement by al-Shāfi'ī that Islamic rules apply to Muslims wherever they are based on the analogy he makes with the prayer.

¹³⁰The monetary value of one *dirham*, a silver coin, equals 2.979 grams of silver. See Qal'ajī, *Mu'jam*, 208.

¹³¹Abū Ḥanīfa has an opinion on the prohibition of usury that certain usurious dealings in the Territory of War are lawful as long as the Muslim is consuming the property or the money of an enemy person.

¹³²It is clear that al-Shāfi'ī's claim that his opinion on applying the *ḥudūd* in the Territory of War as based on evidence from the Qur'ān and *sunna* can be refuted by Abū Ḥanīfa in the sense that the Imām, or his representative governor, should be the one who applies such punishments where he resides, i.e. in the Territory of Islam.

¹³³Al-Shāfi'ī does not provide any information that there is in fact such a juristic opinion, but he is responding to the view of Abū Ḥanīfa that the Imām is the one who applies the *ḥadd*. Al-Shāfi'ī responds by addressing the point about applying the *ḥadd* in rural areas. But Abū Ḥanīfa can respond back by saying that such a person can be brought to the nearest Muslim province where the governor is authorized by the Imām to apply the *ḥadd*.

¹³⁴ The Qur'ānic verse that describes the punishment for highway robbery is 5:33.

¹³⁵ As al-Ṭabarī's *Book of Jihād* shows, there is no specific number of combatants in each detachment (*sariyya*). Rather, the juristic view is that any group of combatants that is sent by the army's commander to raid in enemy territory is considered a detachment.

¹³⁶ Abū Ḥanīfa's opinion is that no one is obligated to perform missed prayers without prior knowledge of the obligation to pray.

¹³⁷ This is the second sub-heading in the original manuscript of al-Ṭabarī's *Book of Jihād*. It includes all the remaining sections in this book.

¹³⁸ Al-Awzā'ī applies here an argument based on "silent consensus" in the sense that when the same case happened before, no one among the religious authorities objected. For an analysis of this legal source, see Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction To Sunni Usul Al-Fiqh* (Cambridge: Cambridge University Press, 1997), 75-81.

¹³⁹ The Arabic word *salab* refers to the spoil of one combatant whom a Muslim combatant puts to death. This includes his weapon and uniform. See Qal'ajī, *Mu'jam*, 248.

¹⁴⁰ The mile (*mīl*) was used by Arabs in medieval times to measure the distance of 1848 meters (*Ibid.*, 470).

¹⁴¹ It is clear that al-Awzā'ī's rationale for deciding such cases is to determine whether the contested party who participates in battle or provides help for the combatants deserves a share in the booty.

¹⁴² Apparently al-Shāfi'ī rejects al-Awzā'ī's analogy of comparing such people with a "Muslim emigrant" or with women and children who are present at the army camp during combat.

¹⁴³ The Arabic term *sulṭān* developed historically to refer to a Sultan, an equivalent to the Imām. But since Muslim caliphs were not called Sultans at the time of Mālik, the reference here is to "political authority" in general.

¹⁴⁴ The Ḥanafī view is based on the assumption that an individual's booty is different from the booty collected by the army.

¹⁴⁵ Mālik might be referring here to earlier jurists in general or to the "People of Medina" whose practice he regards as authoritative.

¹⁴⁶ Al-Awzā'ī is referring to the rebellion against the Umayyad dynasty after the death of the Umayyad caliph al-Walīd b. 'Abd al-Malik.

¹⁴⁷ Abū Thawr's argument is based here on a claim of "silent consensus."

¹⁴⁸ The *dīwān* was instituted first by the second caliph 'Umar b. al-Khaṭṭāb to register the names of combatants in the Muslim army. This is before the Muslim army came to consist of mainly professional soldiers rather than part-time volunteers. See David Nicolle, *Armies of the Muslim Conquest* (London: Osprey, 1993), 12-13.

¹⁴⁹ Mālik's reference to a "light thing" is based on the Qur'ānic permission to eat forbidden food in case of necessity but only in a small amount to preserve one's life. See Q. 2:173.

¹⁵⁰ Al-Awzā'ī is perhaps referring to Muslims who entered Byzantine territory with a pledge of security and stayed there as farmers, paying a land tax, which in Islamic terms is equivalent to one-tenth of the yearly harvest.

¹⁵¹ One *dāniq*, a silver coin, equals 0.496 grams. See Qal'ajī, *Mu'jam*, 206.

¹⁵² The view of Sufyān al-Thawrī is clearly against slaughtering an animal without the need for food consumption.

¹⁵³ The Arabic *shih* most likely refers to a plant from which brooms are made. See Lane, *Lexicon*, vol. 4, 211.

¹⁵⁴ This is a clear case in which al-Awzā'ī changed his opinion according to the narration of Abū Ishāq al-Fazārī.

¹⁵⁵ This Prophetic tradition is found in the collection of Muslim, *Ṣaḥīḥ Muslim*, vol.2, 225.

¹⁵⁶ Another break in the text with several sentences missing from the manuscript.

¹⁵⁷ The reference here is apparently to an ax or any other tool that is used to break up firewood.

¹⁵⁸ As it is apparent in al-Ṭabarī's quotations from earlier jurists, there is disagreement on whether to consider a detachment's commander as a defacto presence of the Imām.

¹⁵⁹ The notion of prohibiting "committing mischief in the land" is based on Qur'ānic verses. See Q. 5:32.

¹⁶⁰ The discussion here relates to the Prophetic tradition according to which Muslim men are not allowed to wear garments made from pure silk. Cf. Mālik, *al-Muwatta'*, vol. 2, 560.

¹⁶¹ Ibn Hishām, *Sīrat al-Nabī*, vol. 2, 111-112.

¹⁶² This Prophetic tradition is found in the collection of Abū Dāwūd, *Sunan Abī Dāwūd* (Cairo: Maktabat al-Azhar, 1978), vol. 3, 14.

¹⁶³ Here there is another break in the text. A few words are missing in the original manuscript.

¹⁶⁴ This Prophetic tradition is found in the collection of Muslim, *Ṣaḥīḥ*, vol. 2, 66.

¹⁶⁵ This is a rare case in which al-Ṭabarī himself adds his own view based on traditions.

¹⁶⁶ A few words are missing in the original manuscript.

¹⁶⁷ The Arabic word *tijfāf* can either refer to a horse's armor or a combatant's armor. An enemy combatant's armor, however, would be more accepted by jurists as part of his spoil than his horse's armor.

¹⁶⁸ This is another indication by al-Awzā'ī that although the army's commander may increase the amount of extra share from one-fourth to one-third, it should not exceed the latter.

¹⁶⁹ Here there is an interesting indication by al-Thawrī that dedicating one-fourth of extra share at the beginning of the campaign and one-third at the end is attributed to the Prophetic practice itself.

¹⁷⁰ See Ibn Hishām, *Sīrat al-Nabī*, vol. 4, 261-262.

¹⁷¹ On the circumstances of the Badr battle, see Ibn Hishām, vol. 2, 266ff.

¹⁷² A few words are missing in the original manuscript.

¹⁷³ Ibn Hishām, *Sīrat al-Nabī*, vol. 4, 321-328.

¹⁷⁴ Another break in the text: most likely only one word is missing.

¹⁷⁵ A *wasāq* equals 165 liters of volume. See Qal'ajī, *Mu'jam*, 502.

¹⁷⁶ Al-Shāfi'ī is referring to Q. 5:35.

¹⁷⁷ Some contemporary scholars of Islam translate the Arabic *majūs* as Magians. See, for example, Majid Khadduri, *Shaybani's Siyar*, 23, 44, and 73. But I prefer to translate *majūs* as Zoroastrians since this is the term used in comparative religion today to refer to the followers of this ancient Persian religion.

¹⁷⁸ Ibn Hishām, *Sīrat al-Nabī*, vol. 2, 93-94.

¹⁷⁹ The *mudd* is a measuring unit of size or volume that is approximately equal to three handfuls of any substance. See Qal'ajī, *Mu'jam*, 407.

¹⁸⁰ Medieval Arabic linguists do not provide a precise definition for the Arabic word *qash'*, but most likely it refers to a shirt made of fur. See Lane, *Lexicon*, vol. 5, 62-64.

¹⁸¹ This is based on the juristic understanding that since this slave was a Muslim before, he should be punished because of his conversion from Islam to another religion. Although this rule is based on a Prophetic tradition, many contemporary Muslim jurists disagree with the authenticity of such a tradition and therefore reject the rule.

¹⁸² A few words are missing in the original manuscript.

¹⁸³ This Prophetic tradition is found in the collection of Muslim, *Ṣaḥīḥ*, vol. 2, 40.

¹⁸⁴ A few words are missing in the original manuscript.

¹⁸⁵ The point here is to honor the latest agreement of future manumission made between a slave and his master even if the master is an enemy person.

¹⁸⁶ On the religious laws concerning the funeral prayer in Islam, see Laleh Bakhtiar, *Encyclopedia of Islamic Law: A Compendium of the Major Schools* (Chicago: ABC International Group, 1996), 50-51.

¹⁸⁷ Al-Awzā'ī is referring here to earlier jurists.

¹⁸⁸ This is based on the understanding that a Muslim does not inherit from a non-Muslim and vice versa.

¹⁸⁹ Mālik includes this Prophetic tradition in his *Muwatta'*, vol. 2, 73.

¹⁹⁰ This Prophetic tradition is found in the collection of Abū Dāwūd, *Sunan*, vol. 3, 76.

¹⁹¹ This case illustrates, as several others do, that although a Prophetic tradition is mentioned by one of the jurists, it is still possible to regard an opinion based on analogy as more in line with the general principles of Islamic law.

¹⁹² Mālik's response highlights a point mentioned by modern reformers, such as Muḥammad Rashīd Riḍā (d. 1935), that whatever rules that are not mentioned in the Qur'ān or Prophetic traditions are considered to be dealing with matters that are beyond the realm of religion, and therefore they can be instituted or changed by political authorities. See Muḥammad Rashīd Riḍā, *Yusr al-Islām (The Easiness of Islam)*, (Cairo: Dār al-Manār, 1953), 7-11.

¹⁹³ This Prophetic tradition is found in the collection of Muslim, *Ṣaḥīḥ*, vol. 2, 33-34.

¹⁹⁴ Ḥaṭīb b. Abū Balta'a was a companion of Muḥammad in Medina who spied for the polytheists of Mecca by providing them with information about the Muslims' military plan. See Ibn Hishām, *Sīrat al-Nabī*, vol. 4, 16.

¹⁹⁵ Here Abū Yūsuf, similar to other jurists, deems such action as morally repugnant but legally not punishable.

¹⁹⁶ Although the term *muṣḥaf* is usually used to refer to the Qur'ān, it is used here in the general sense of a religious book.

¹⁹⁷ The dog is considered in Islamic law to be unclean, specifically its saliva, based on Prophetic traditions. See Bakhtiar, *Encyclopedia*, 13.

¹⁹⁸ Al-Awzā'ī indicates here that these items must be submitted with the collected booty.

¹⁹⁹ In all such cases, Abū Ḥanīfa and his companions honor the agreement of future freedom between a slave and his original master.

²⁰⁰ According to a Qur'ānic rule, Q. 3:164, a Muslim man may marry a woman from the People of the Book, namely a Christian or a Jew, but it seems that the jurists' concern here relates to women from among the enemy.

²⁰¹ Al-Shāfi'ī is using analogy to show that in all of the cases where a man enters into a marriage contract with a slave or free woman, he has to make sure first that she is not pregnant from her previous husband, whether this previous husband was a Muslim or a non-Muslim living in enemy territory.

²⁰² Mālik is asserting here that Muslims fighting alongside an enemy will not be able to invite the warring party to embrace Islam because the enemy with whom they are joining in combat would invite their enemies, before the actual combat begins, into what they believe in.

²⁰³ The question is posed here based on the understanding that when Muslim combatants engage in war, they should invite the enemy first to embrace Islam, and those Muslims who fight alongside the enemy against another enemy would not be able to invite the latter to Islam because they are fighting under the banner of the first enemy.

²⁰⁴ Al-Awzā'ī is asking the question out of an awareness that such a woman cannot endure the beating for a long time.

GLOSSARY OF ARABIC TERMS

‘Ahd: Covenant of peace (or any type of covenant).

Ahl al-Dhimma: Non-Muslims protected by the Islamic state.

Ahl al-Hadith: (Lit.) “People of Prophetic traditions”; a legal school in the formative period of Islamic law traditionally referring to Malik b. Anas and the jurists of Medina.

Ahl al-Ḥarb: (Lit.) “People of War”; subjects of enemy territory.

Ahl al-Kitāb: (Lit.) “People of the Book,” i.e., Jews and Christians; but according to al-Shāfi‘ī and other jurists, all those who pay the poll-tax (*jizya*), such as the Magians. *See also Jizya.*

Ahl al-Ra’y: (Lit.) “People of Opinion”; a legal school in the formative period of Islamic law traditionally referring to Abu Hanifa and his companions.

Ahl al-Shirk: (Lit.) “People of Shirk”; those who worship another god(s) besides Allah; “disbelievers.”

A‘jamī: A non-Arab person.

Ama: A slavewoman.

Amān: A “pledge of security,” given to one of the enemy for a certain period of time.

Amīr: A military commander; also used for other types of leadership and as a title for the Caliph.

Al-Sibā’: *See Sibā’.*

‘Aql: Blood money paid to the victim’s family by the blood relatives of the person who commits the murder.

Arḍ: Land; territory.

Arḍ al- Ḥarb: “Territory of War”; enemy territory.

Arsh: Damage or compensation for an injury or wound.

‘Askar: Army combatants or their military camp.

Asrā (sing., *asīr*): Prisoners of war.

Athar: Narrative; tradition; precedent.

Āya: A Qur’ānic verse.

Bayt al-Māl: The official treasury office of an Islamic state.

Bāṭil: Void; invalid.

Bay’: Exchange; sale transaction.

Ḍamān: Liability, usually used for financial guarantee of payment.

Dār: House; abode; territory

Dār al-Ḥarb: (Lit.) “Territory of War”; enemy territory.

Dār al-Islām: (Lit.) “Territory of Islam”; territory of the Islamic state.

Da‘wa: The invitation to embrace Islam.

Dharārī: Children captives.

Dhimma: A contract of protection given to non-Muslim subjects of the Islamic state.

Dhimmī: A non-Muslim protected by an Islamic state. The protected status of non-Muslims was contingent on their agreeing to pay the Muslim poll-tax (*jizya*). *See also* **Ahl al-Dhimma; Jizya.**

Dīnār: Gold unit of coinage, usually equal to 4.25 grams. (Derived from the Greco-Roman *dinarius*.)

Dirham (pl., *darāhim*): Silver unit of coinage, equal to 2,979 grams.

Dīwān: Army record.

Diya: Blood money.

Faqīh: Jurist.

Fāris: Horse rider.

Fāsīd: Defective; voidable.

Fatwās (sing., *fatwā*): (Lit.) "Answers"; religious rulings or opinions given by Muslim jurists.

Fay': Technically, property taken from non-Muslims without violence or outside a state of war, but sometimes interchangeable with *ghanīma* (q.v.).

Fidā': Ransom.

Fiqh: Islamic jurisprudence.

Fidya: Ransom.

Fuqahā': See *faqīh*.

Furu': (Lit.) branches; part of the corpus of islamic law that includes different legal cases and the jurists' rulings rather than the theory of Islamic law.

Ghanīma: "Booty" or "spoils of war". See also **Fay'**.

Ghaṣb: Usurpation.

Ghāzī: Warrior.

Ghazw: Raid.

Ghulūl: Treachery; unlawful booty.

Ḥadd: Fixed punishment for certain crimes, as stipulated in the Qur'ān (such as murder or adultery).

Ḥadīth: "A (Prophetic) tradition"; that is, the report of a saying or action of the Prophet Muḥammad.

Ḥalāl: Permitted.

Ḥarām: Forbidden.

Ḥarb: War.

Ḥarbī: One of the enemy (an enemy person).

Hijra: Emigration; the emigration of the Prophet of Islam with his followers from Mecca to Medina in 622 C. E.

Hiraba: The state of being in war (against Muslims).

Ḥirz: Place of security (i.e., the Territory of Islam).

Ḥudaybiyya: A village near Mecca where peace was concluded between Muḥammad and the polytheists (*mushrikūn* [q.v.]) of Mecca.

Ḥukm: Judgement; decision; ruling.

Ḥurr: Freeman.

‘Idda: Waiting period for a woman after the divorce or death of her husband.

Iḥrāz: See *ḥirz*.

Ijma‘: A consensus of all Muslim jurists on the rule concerning a legal case during a specific time.

Ikhtilāf: A “disagreement” (or, “difference of opinion”); specifically, one among Muslim jurists.

Ikrāh: See *makrūh*.

‘Illa: Reason; the efficient cause of having any legal rule to be used in analogy

‘Ilj: Originally a non-Arab unbeliever; disbeliever.

Imān: Religious faith or conviction.

Imām: The leader of an Islamic state; also, “leader of the (Islamic) prayer” or the leader of a religious community.

Isnad: A chain of authorities narrating a tradition

Istiḥsān: Juristic preference.

Jā'iz: Permissible.

Jam': (Lit.) "To unite" or "collect," as in uniting several Qur'ānic verses or *ḥadīth* (q.v.) together and regarding them as compatible.

Jāriya: A slave-girl.

Jaysh: Army; army combatants.

Jihād: A general term for strife or struggle for the cause of Allah, specifically used in medieval texts for war against disbelievers.

Jihad al-nafs: A struggle to religiously purify the self.

Juhd: Effort.

Jinayat: Illegal actions that require in Islamic law applying a punishment, whether hadd or qisas.

Jizya: (Lit.) "Tribute"; the poll-tax, assessed on protected non-Muslims. *See* **Dhimmi**.

Kaffāra: Religious expiation.

Kāfir (pl., *kuffār*): A disbeliever.

Kharāj: The land-tax.

Khata': Unintentional killing.

Khums: (Lit.) "One-fifth"; technically, one-fifth of the share of the booty (*ghanīma* [q.v.]) allocated to the Muslim authority.

Khawārij (sing., *khārijī*): Rebels; specifically, members of a group of Muslim sects during Umayyad and 'Abbasid times.

Kurā': Ungulate (hooved) animals; though for some jurists, exclusively 'horses.'

Makrūh: Objectionable.

Māl (pl. *amwāl*): "Property"; also used in some cases for "money".

Mamlūk: Slave.

Mawāt: Wasteland.

Mawlā: Master; owner; client.

Mithla: Mutilation.

Mu‘āhada: Peace treaty.

Mudabbar: A slave whose manumission (freedom) takes effect upon the death of his/her owner. *See also Mukātab.*

Mudabbara: Female *mudabbar* (q.v.).

Muftī: Jurisconsult.

Muhādana: Peace agreement.

Muḥtalim: A youth who has reached puberty.

Mukātab: A slave whose manumission (freedom) is obtained over time in installments. *See also Mudabbar.*

Murtadd: Apostate.

Mushrikūn (sing., *mushrik*): “Polytheists”; “disbelievers.”

Musta‘man: One of the enemy who is given a pledge of security. *Cf.*
Musta‘min.

Musta‘min: One of the enemy who asks for a pledge of security (*amān* [q.v.]).
Cf. **Musta‘man.**

Muwāḍa‘a: Peace agreement.

Nafl: Compensation from the spoil in addition to an assigned share (supererogatory).

Naskh: “Abrogation”; the resolution of apparently contradictory statements from the Qur’ān or *ḥadīth* in which one statement is said to “abrogate,” or supercede, the others. *See also Ta‘ārūḍ.*

Nikāḥ: Marriage; marital relations.

Qāḍī: Judge.

Qadhf: A false accusation of fornication.

Qatl: Killing (of someone); homicide.

Qīma: Price.

Qitāl: Fighting; battle.

Qiyās: Legal reasoning by analogy.

Quraysh: The Arabian tribe from which the Prophet Muḥammad originated.

Rājil: Foot soldier.

Rasūl: Emissary; messenger; apostle.

Ra'y: Opinion.

Rumḥ: Lance.

Sabī: Captive women and children.

Ṣadaqa: Charitable alms, often used in the sense of *zakāt* (q.v.).

Sahm: A share in the booty.

Salab (pl. *aslāb*): Prime; the spoil of an enemy killed in a duel or battle, such as his clothes, weapons, etc.

Ṣalāt: Ritual prayer.

Sarīyya: A military detachment.

Sharī'a: Islamic law based on the Qur'ān and/or "strong" Prophetic tradition (*ḥadīth* [q.v.]).

Shī'ī Muslims: The minority of Muslims today; those who believe Muḥammad's cousin and son-in-law 'Alī b. Abī Ṭālib to be the Prophet's legitimate successor. *See also* **Sunnī Muslims**.

Shirk: *See* **Ahl al-Shirk**.

Sibā': The practice of holding women and children captive (practiced throughout the Mediterranean and European civilizations of the Middle Ages).

Sīra: The life of the Prophet Muḥammad; also used to refer to the conduct of a state.

Ṣulḥ: Peace agreement.

Sunna: Custom or precedent based on the Prophet's acts or sayings.

Sunni Muslims: The majority of Muslims today; those accept the rule of the four "well-guided" Caliphs (Abū Bakr, 'Umar, 'Uthmān, and 'Alī) who succeeded Muḥammad.

Ta'āruḍ: In Islamic law, the dilemma of apparent contradiction between the meaning of verses in the Qur'ān and/or *ḥadīth* (q.v.). *See also* Naskh.

Thaman: Value.

Umm Walad: A slave woman who has borne a child to her owner.

'Uqr: Compensation given by a master to his slave woman as dowry.

'Ushr: Tithe.

'Utq: Manumission.

Wālī: A Muslim local or regional governor.

Waqf: Something held in trust (such as property).

Zakāt: Obligatory alms-giving, considered one of the five "pillars" (*arkān*) of Islām.

SELECTED BIBLIOGRAPHY

- ‘Abd al-Maqqūd, Yūsuf M. *Al-‘Alāqāt al-A‘imma wal-Khaṣṣa fil-Islām (Public and Private Relationships in Islam)*. Cairo: Sayyid Maḥmūd, 1978.
- Abu Rabi‘, Ibrahim. *Intellectual Origins of Islamic Resurgence in the Modern Arab World*. Albany: State University of New York, 1996.
- Abou al-Fadl, Khaled. *Rebellion and Violence in Islamic Law*. New York: Cambridge University Press, 2001.
- _____. “Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam,” in *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, ed. James Turner Johnson and John Kelsay. Westport: Greenwood Press, 1990, 149-76.
- _____. “The Common and Islamic Law of Duress” in *Arab Law Quarterly* 2 (1991): 121-159.
- Abū Dāwūd, *Sunan Abī Dāwūd*. Cairo: Maktabat al-Azhar, 1978.
- Abū Ishāq Ibrāhīm al-Shirāzī (d. 476/1083). *Kitāb al-Tanbīh*. Cairo: al-Manār, 1984.
- Abū Yūsuf, Ya‘qūb. *Kitāb al-Kharāj*. Beirut: Dār al-Risāla, 1991.
- Abū Zahrā, Muḥammād. *Uṣūl al-Fiqh (The Principles of Jurisprudence)*. Cairo: Dār al-Fikr al-‘Arabī, 1956.
- _____. “International Relations in Islam” in *The First Conference of the Academy of Islamic Research*. Cairo: S.O.P. Press, 1964.
- Abū Zakariyyā Yaḥyā al-Nawawī (d. 676/1278). *Minhāj al-Ṭālibīn*. Cairo: al-Maktaba al-Salafiyya, 1967.
- Aḥmad, al-Qudūrī. *Al-Mukhtaṣar*. Beirut: Dār al-Kutub, 1988.
- Akbar, M. J. *The Shade of Swords: Jihad and the Conflict between Islam and Christianity*. London: Routledge, 2002.
- Azami, M. M. *On Shacht’s Origins of Muhammadan Jurisprudence*. New York: John Wiley, 1985.
- Badr al-Dīn, Ibn Jamā‘a. *Taḥrīr al-Aḥkām fī Tadbīr Millat al-Islām*. Damascus: Maktabat al-Qayrawān, 1977.
- Bakhtiar, Laleh. *Encyclopedia of Islamic Law: A Compendium of the Major Schools*. Chicago: ABC International Group, 1996, 350-353.

- Ben Shemesh, A. *Taxation in Islam: A Translation of Abu Yusuf's Kitab al-Kharaj*. Leiden: E.J. Brill, 1965.
- Bonner, Michael David. *Aristocratic Violence and Holy War: Studies in the Jihad and the Arab-Byzantine Frontier*. New Haven: American Oriental Society, 1996.
- _____. *Jihad in Islamic History*. Princeton: Princeton University Press, 2006.
- Bonney, Richard. *Jihad: from Qur'an to bin Laden*. New York: Palgrave, 2004.
- Calder, Norman. "Ikhtilāf and Ijmā' in Shāfi'ī's Risāla" in *Studia Islamica*, 58 (1984): 55-81.
- Donner, Fred. "The Sources of Islamic Conceptions of War" in *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, ed. John Kelsay and James Turner Johnson. Westport: Greenwood Press, 1991.
- Encyclopedia of Islam*, 2nd edition (CD). Leiden: E. J. Brill, 2003.
- Farrukh, Omar A. *On Public and Private Law in Islam, or Public Policy in Islamic Jurisprudence*. Beirut: Khayat's, 1966.
- Firestone, Reuven, . *Jihād: The Origin of Holy War in Islam*. New York: Oxford University Press, 1999.
- Ghunaimi, Mohammad Talaat Al. *The Muslim Conception of International Law and the Western Approach*. The Hague: 1968.
- Hallaq, Wael B. *A History of Islamic Legal Theories: An Introduction To Sunni Usul Al-Fiqh*. Cambridge: Cambridge University Press, 1997.
- Hamidullah, Muhammad. *Muslim Conduct of State*. Lahore: Muhammad Ashraf, 1973.
- Hourani, George. "The Basis of Authority of Consensus in Sunnite Islam" in *Studia Islamica*, 21 (1964): 11-60.
- Ibn Qayyim al-Jawziyya. *Zād al-Ma'ād (Provisions for the Hereafter)*. Beirut: Maktabat al-Risāla, 1983.
- Ibn Hishām, *Sīrat al-Nabī (The Life of the Prophet)*. Beirut: Maktabat al-Nahda, 1987.
- Ibn Mājah. *al-Sunan*. Baghdad: Maktabat al-Muthannā, 1973.
- Ibn Ishāq. *Sīrat Rasūl Allāh*. Cairo: Maktabat Wahba, 1980.
- Ibn Kathīr, *Tafsīr al-Qur'ān al-'Azīm (Commentary on the Great Qur'ān)*. Beirut: Dār al-Qur'ān, 1981.
- Ibn Taymiyya, Taqī al-Dīn. *Al-Siyāsa al-Shar'iyya*. Cairo: al-Maktaba al-Salasiyya, 1976.

- Jansen, Johannes J.G. *The Neglected Duty: The Creed of Sadat's Assassins and Islamic Resurgence in the Middle East*. New York and London, 1986.
- Kalziya, 'Abd al-Wahhāb. *Al-Shar' al-Dawlī fī 'Ahd al-Rasūl (International Relations During the Time of the Prophet)*. Beirut: Dār al-'Ilm lil-Malāyīm, 1984).
- Keller, Noah Ha Mim, ed. *The Reliance of the Traveller: a Classical Manual of Islamic Sacred Law*. Evanston: Sunna Books, 1991.
- Kelsay, John. *Islam and War: A Study in Comparative Ethics*. Louisville: 1993.
- Kern, Frederick. ed., *Ikhtilāf al-Fuqahā' lil-Ṭabarī*. Cairo: Al-Mawsū'āt, 1902.
- Khadduri, Majid. *War and Peace in the Law of Islam*. Baltimore: Johns Hopkins University Press, 1955.
- _____. *The Islamic Law of Nations: Shaybani's Siyar*. Baltimore: Johns Hopkins University Press, 1966.
- Khalifa, Abd al-Hakim. "War and Peace" in *Muslim Self-Statement in India and Pakistan, 1858-1968*, ed. Aziz Ahmad and G.E. von Grunebaum. Wiesbaden: Harrassowitz, 1970, 182-9.
- Khan, Zafrullah. "Islam and International Relations" in *International Spectator* 10 (1956), nr. 11, 308-22.
- Kraemer, Joel L. "Apostates, Rebels and Brigands" in *Israel Oriental Studies* 10 (1980): 34-73.
- Lane, Edward. *Arabic English Lexicon*. Beirut: Library of Lebanon, 1968.
- Lewis, Bernard. *Islam and the West*. New York: Oxford University Press, 1993.
- _____. *The Political Language of Islam*. Chicago: The University of Chicago Press, 1988.
- Makdisi, John. "Hard Cases and Human Judgment in Islamic and Common Law" in *Indiana International and Comparative Review*, 2 (1991): 191-219.
- Mālik b. Anas, *al-Muwatta'*. Beirut: Dār al-Fikr, 1994.
- al-Māwardī, 'Alī b. Muḥammad. *Kitāb al-Aḥkām al-Sulṭāniyya*. Cairo: Dār al-Ma'ārif, 1989.
- Mawlawi Cheragh Ali, *A Crtiical Exposition of Popular Jihad*. Calcutta: Thecker, Spink & Co., 1885.
- Mayer, Ann Elizabeth. "War and Peace in the Islamic Law Tradition and International Law" in *Just War and Jihad*, ed. James Turner Johnson and John Kelsay. New York: Greenwood, 1991.
- al-Muḥaqqiq al-Hillī. *Sharā'i' al-Islām fī Masā'il al-Ḥalāl wal-Ḥarām*. Tehran: al-Isha'a, 1985.
- Muslim b. Hajjāj. *Ṣaḥīḥ Muslim*. Cairo: Dār al-Fikr, 1977.

- al-Nawawī, ‘Abd al-Khāliq. *Al-‘Alāqāt al-Duwalīyya wal-Nuḏūm al-Qaḏā’iyya* (International Relations and Judicial Systems). Beirut: Dār al-Kitāb al-‘Arabī, 1974).
- Nicolle, David. *The Armies of Islam: 7th-11th Centuries*. London: Osprey, 1982.
- _____. *Armies of the Muslim Conquest*. London: Osprey, 1993.
- Partner, Peter. *God of Battles: Holy Wars of Christianity and Islam*. Princeton: Princeton University Press, 1997.
- Peters, Rudolph. *Islam and Colonialism: The Doctrine of Jihad in Modern History*. The Hague: 1979.
- _____. *Jihad In Classical and Modern Islam*. Princeton: Markus Wiener, 1996.
- _____. “The Political Relevance of the Jihad Doctrine in Sadat’s Egypt” in *National and International Politics in the Middle East: Essays in Honour of Eli Kedourie*, ed. E. Ingram. London: Cambridge University Press, 1986, 252-273.
- Pruthie, Raj. *Encyclopaedia of Jihad*. New Delhi: Anmol, 2002.
- Qal‘ajī, Muḥammad Rawwās. *Dictionary of Islamic Legal Terminology*. Beirut: Dār al-Nafā’is, 1985.
- _____. *Mu‘jam Lughat al-Fuqahā’* (Dictionary of Juristic Terms). Karachi: Idaratul Qur’an, n.d.
- al-Ṣāliḥ, Ṣubḥī. *Dirāsāt fīl-Nuḏūm al-‘Arabiyya* (Studies in Arabic Political Systems). Beirut: Dār al-Fikr, 1972.
- Sardar Ali, Shaheen. “The Concept of Jihad in Islamic International Law” in *Journal of Conflict and Security Law* 10 (2005): 321-343.
- Schacht, Joseph. *Das Konstantinopler Fragment Des Kitāb Ihtilāf al-Fuqahā’*. Leiden: E.J. Brill, 1933.
- _____. *The Origin of Muhammadan Jurisprudence*. Oxford: Clarendon Press, 1975.
- al-Shāfi‘ī, Muḥammad b. Idrīs. *al-Umm*. Beirut: Dār al-Fikr, 1990.
- Siddiqi, Aslam. “Jihad, an Instrument of Islamic Revolution” in *Islamic Studies* 2 (1963), pp. 383-98.
- ‘Uthmān, Muḥammad R. *Al-Ḥuqūq wal-Wājibāt al-Shar‘iyya fīl-Islām* (Religious Rights and Obligations in Islam). Cairo: Al-Sa’āda, 1975.
- Wiederhold, Lutz. “Legal Doctrines in Conflict: The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlīd* and *Ijtihād*” in *Islamic Law and Society* 4 (1996): 234-304.

- Zaydān, 'Abd al-Karīm. *Majmū'at Buḥūth Fiqhiyya: al-Sharī'a al-Islamiyya wal-Qānūn al-Dawlī al-'Ām* (Anthology of Studies in Jurisprudence: Islamic Law and the International Law). Baghdad: Al-Quds Library, 1975.
- Zebiri, Kate. *Maḥmūd Shaltūt and Islamic Modernism*. Oxford: Clarendon Press, 1993.
- al-Zuhaylī, Wahba. *Al-'Alāqāt al-Duwaliyya fil-Islām* (International Relations in Islam). Beirut: Al-Risāla, 1981.

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